81-1839

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

APPENDIX A

Opinion of Minnesota Supreme Court
No. 51616
STATE OF MINNESOTA
IN SUPREME COURT

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Respondent,

vs.

COMMISSIONER OF REVENUE,
Appellant.

Filed December 17, 1981
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Minn. Stat. § 297A.14 (1980), imposing a use tax on paper and ink consumption above $100,000 on some publications, is not an unconstitutional burden upon freedom of the press under the principles of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); nor is there a denial of equal protection as a result of the fact that section 297A.14 affords differing tax treatment to newspaper publishers and other industrial users, or to large and small publishers. This use tax is an ordinary form of taxation for the support of government. The classifications within this tax are justified by the compelling government purpose of revenue raising.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

SHERAN, Chief Justice.

The issue in this case is whether the State of Minnesota may, consistent with both the federal and state constitutions, impose a use tax on consumption of ink and paper which, due to an exemption in the law, is paid by some newspapers and publications but not by all. The challenged statute in force at the times relevant here, Minn. Stat. § 297A.14 (1980), provided that "the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication defined in section 297A.25, subdivision 1, clause (i)" was subject to the general use tax imposed by the section: a tax on "using, storing or consuming in Minnesota tangible personal property" at a rate of 4% of the sales price of sales at retail of the item.[1] Section 297A.25, subd. 1(i), states that a "publication" is a legal newspaper, defined by Minn. Stat. § 331.02 (1980), or any other publication "regularly issued at average intervals not exceeding three months." Respondent, a newspaper publisher consuming over $100,000 in paper and ink products annually, challenges the use tax as an unconstitutional burden upon freedom of the press, protected by U.S. Const. amend. I, XIV, and Minn. Const. art. 1, § 3, and a denial of equal protection of the law, provided by U.S. Const. amend. XIV, § 1, and Minn. Const. art. 10, § 1.

Respondent Minneapolis Star and Tribune Company (Star Tribune) sought a refund from the state department of

[1] The rate of this use tax has now been raised to 5% for the period after June 30, 1981, and prior to July 1, 1983. Act of June 6, 1981, ch. 1, art. IV, § 5, 1981 Minn. Sess. Law Serv. (West). The $100,000 figure and relevant wording of section 297A.14 have not been altered. *Id.*

revenue of $874,265.04, with interest, in use taxes paid over a 17-month period from January 1, 1974, to May 31, 1975. The refund was denied and respondent appealed the denial in Hennepin County District Court pursuant to Minn. Stat. § 297A.35, subd. 2 (1980). The district court granted summary judgment to Star Tribune, declaring the use tax unconstitutional on all suggested grounds. We reverse.

I.

The use tax challenged here is part of a system of sales and use taxes initially created by the state legislature in the Tax Reform and Relief Act of 1967. Act of June 1, 1967, ch. 32, art. 13, 1967 Minn. Laws Sp. Sess. 2143, 2177. The law then wholly exempted from use tax the gross receipts from the sale, storage, use or consumption of all tangible personal property, including paper ink products, used in or consumed in any publication regularly issued at average intervals not exceeding three months. *Id.* § 25, subd. 1(i), at 2186. The publications themselves were also exempt from sales tax. *Id.* The rate of sales and use tax was 3% at that time. *Id.* § 2, at 2179; § 14, at 2182.

Effective November 1, 1971, the paper and ink products exemption for publications was eliminated and all paper and ink products were subject to the use tax. Act of Oct. 30, 1971, ch. 31, art. 1, § 5, subd. 1(i), 1971 Minn. Laws Sp. Sess. 2561, 2565.

The use tax on all paper and ink products obtained until January 1, 1974. On that date, the legislature put into effect the section challenged here, which granted an exemption from the use tax only for the first $100,000 of paper and ink products consumed annually. Act of May 24, 1973, ch. 650, art. 13, § 1, 1973 Minn. Laws 1606, 1637 (codified at Minn. Stat.

§ 297A.14 (1980).[2] The consequence of this exemption was a $4,000 tax credit to newspapers and other publishers.[3] Publications remained exempt from sales tax.

Respondent Star Tribune is the publisher of two newspapers in the state, one a morning paper and the other an evening paper. During 1974 and 1975, Star Tribune published the morning paper seven days per week and the evening paper six days per week. Currently, Star Tribune publishes the morning paper seven days per week and the evening paper five days per week. The physical components of Star Tribune's newspaper are, of course, newsprint and ink, the two items subject to the use tax at issue.

In 1974, Star Tribune was one of 11 publishers of daily newspapers in the State of Minnesota that consumed paper and ink products in excess of $100,000 and therefore paid the

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[2] Minn. Stat. § 297A.14 (1980) reads in full:

297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES.

For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section.

(The statute was recently amended. *See* note 1 *supra*.)

[3] Publishers of more than one newspaper are entitled to a $100,000 exemption for each publication. Respondent Star Tribune is entitled to two such exemptions.

4% use tax on the amount above that figure.[4] That year there

[4] Respondent submitted the following data for 1974:

	City	Newspaper	Circulation	Taxes Paid on Newsprint and Ink
1,2	Minneapolis	Star (Evening)	255,964*	$608,634
		Tribune (Morning)	233,381*	
		Tribune (Sunday)	640,756*	
3,4	St. Paul	Dispatch (Evening)	125,129	$202,248
		Pioneer Press (Morning)	107,266	
		Pioneer Press (Sunday)	238,888	
5,6	Duluth	Herald (Evening)	22,120	$ 33,805
		News-Tribune (Morning)	53,559	
		News-Tribune (Sunday)	83,398	
7	Rochester	Post-Bulletin	33,175	$ 20,800
8	St. Cloud	Times	26,574	$ 14,388
9	Mankato	Mankato Free Press	24,488	$ 7,774
10	Winona	Winona Daily News	21,633	$ 3,043
11	Worthington	Worthington Daily Globe	17,131	$ 218
12	Willmar	West Central Daily Tribune	16,483	$ 1,444
13	Brainerd	Brainerd Daily Dispatch	13,461	-0-
14	Virginia	Mesabi Daily News	13,445	$ 881
15	Fergus Falls	Daily Journal	13,293	$ 120
16	Fairmont	Sentinel	13,000	-0-
17	Austin	Austin Daily Herald	12,797	-0-
18	New Ulm	New Ulm Daily Journal	12,300	-0-
19	Albert Lea	Evening Tribune	10,829	-0-
20	Red Wing	Republican Eagle	9,295	-0-
21	Hibbing	Hibbing Daily Tribune	9,278	-0-
22	Faribault	Daily News	8,861	-0-
23	Owatonna	People's Press	7,407	-0-
24	Bemidji	The Pioneer	6,650	-0-
25	Little Falls	Transcript	6,411	-0-
26	Marshall	Independent	5,630	-0-
27	International Falls	The Daily Journal	5,256	-0-
28	Waseca	Waseca's Daily Journal	4,856	-0-
29	Crookston	Crookston Daily Times	4,768	-0-
30	Stillwater	Stillwater Gazette	4,550	-0-
31	Minneapolis	Finance and Commerce	1,782	-0-

* Average paid circulation twelve (12) months ended March 31, 1974.

Plaintiff's Exhibit 3. The data was compiled under the direction of plaintiff's affiant, Robert M. Shaw, the manager of the Minnesota Newspaper Association.

were 388 paid circulation newspapers in the state, 29 of which were daily papers.

In 1975, Star Tribune was one of 13 publishers of daily papers paying any use tax on ink and paper products, out of a total of 374 paid circulation newspapers in the state, 29 of which were daily papers.[5]

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[5] Respondent submitted the following data for 1975:

	City	Newspaper	Circulation	Taxes Paid on Newsprint and Ink
1,2	Minneapolis	Star (Evening)	252,020*	$636,113
		Tribune (Morning)	229,769*	
		Tribune (Sunday)	619,154	
3,4	St. Paul	Dispatch (Evening)	120,288	$217,640
		Pioneer Press (Morning)	102,395	
		Pioneer Press (Sunday)	239,118	
5,6	Duluth	Herald (Evening)	21,855	$ 39,462
		News-Tribune (Morning)	51,369	
		News-Tribune (Sunday)	82,087	
7	Rochester	Post-Bulletin	34,675	$ 19,300
8	St. Cloud	Times	29,473	$ 12,613
9	Mankato	Mankato Free Press	24,545	$ 9,356
10	Winona	Winona Free Press	21,633	$ 1,691
11	Willmar	West Central Daily Tribune	17,375	$ 2,220
12	Worthington	Worthington Daily Globe	17,170	$ 926
13	Virginia	Mesabi Daily News	13,801	$ 2,225
14	Fergus Falls	Daily Journal	13,647	$ 208
15	Brainerd	Brainerd Daily Dispatch	13,440	$ 656
16	Fairmont	Sentinel	12,856	-0-
17	Austin	Austin Daily Herald	12,510	$ 1,645
18	New Ulm	New Ulm Daily Journal	12,501	-0-
19	Albert Lea	Evening Tribune	11,116	-0-
20	Red Wing	Republican Eagle	9,012	-0-

The data submitted by Star Tribune[6] show a rough correlation between volume of circulation and incidence and amount of use tax paid, but larger papers did not uniformly pay more use tax. In 1974, for instance, the Brainerd Daily Dispatch, a newspaper with a circulation of 13,461, paid no use tax, while the West Central Daily Tribune, circulation 16,483, paid nearly $1500 and the Worthington Daily Globe, circulation 17,131, paid just over $200. In addition to these data, respondent's affiant, Robert M. Shaw, the manager of the Minnesota Newspaper Association, stated that a newspaper published fewer than three times per week would not have consumed sufficient paper and ink to require payment of any use tax in 1974 and 1975. Respondent's data show that in 1974 and 1975 approximately 3% of all newspaper publishers in the State of Minnesota consumed paper and ink in excess of $100,000 annually and were therefore obligated to pay the use tax in amounts varying from $120.00 to $636,113.00. The remaining 97% paid no use tax.

21	Hibbing	Hibbing Daily Tribune	8,871	-0-
22	Faribault	Daily News	8,539	-0-
23	Owatonna	People's Press	7,177	-0-
24	Bemidji	The Pioneer	6,600	-0-
25	Little Falls	Transcript	6,437	-0-
26	Marshall	Independent	NA	-0-
27	International Falls	The Daily Journal	5,071	-0-
28	Waseca	Waseca's Daily Journal	4,825	-0-
29	Crookston	Crookston Daily Times	4,650	-0-
30	Stillwater	Stillwater Gazette	7,000	-0-
31	Minneapolis	Finance and Commerce	1,782	-0-

* Average paid circulation twelve (12) months ended March 31, 1975.

Plaintiff's Exhibit 4. This data was compiled in the same fashion as the data in footnote 4 *supra*.

[6] See footnotes 4 and 5, *supra*.

II.

The equal protection claim in this case is closely intertwined with the first amendment interests at stake. The use tax law, because it appears to treat newspaper publishers as different from industrial users of paper and ink products, may be an unconstitutional burden on newspaper publication, an expressive activity protected by the first amendment. Moreover, because it appears to treat some newspaper publishers as different from other newspaper publishers, the use tax may be unconstitutional as an unfair burden upon only a segment of the class of publishers. Although the parties have treated the equal protection and first amendment issues in separate portions of their briefs, we find that the analysis is inextricable. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). We will consider the first amendment and the equal protection claims together here.

In considering each of respondent's arguments, we keep in mind the strict standard that must be applied when protected first amendment rights may be infringed. *Police Department of Chicago v. Mosley*, 408 U.S. at 101 and n.8; *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Big Mama Rag, Inc. v. United States*, 631 F. 2d 1030, 1035 (D. C. Cir. 1980). We afford the legislature broad discretion in enacting tax laws, but we recognize that "[i]t is settled that speech can be effectively limited by the exercise of the taxing power." *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

We first address the issue whether section 297A.14 is unconstitutional because it appears to tax newspaper publishers in a different manner than it taxes other industrial users of paper and ink products. Newspaper publishers pay the use tax on paper and ink consumed in production of their prod-

ucts, but other industrial users, such as printers of food wrappers, books and stationery, do not.

Owners of newspapers are not immune from "ordinary forms of taxation for the support of the government" on account of the first amendment guarantee of freedom of the press. *Grosjean v. American Press Co.*, 297 U.S. at 250; *cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) (first amendment does not immunize interstate newspaper publishers from requirements of Fair Labor Standards Act); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (first amendment does not immunize interstate newsgathering agency from requirements of NLRA). The question here, then, "is not whether the prospective ban burdens newspapers—it clearly may do so—but rather whether there is something special about the burden that renders it unconstitutional." *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938, 953 (D.C.Cir. 1977), *modified*, 439 U.S. 775 (1978).

An unconstitutional burden upon freedom of the press due to a tax measure was found in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The State of Louisiana had imposed a license tax only upon those publications with circulations greater than 20,000 copies per week. Just thirteen newspapers in the state qualified to pay the tax. *Id.* at 240-41. The rate of the tax on these papers was 2% of the gross receipts from advertising.

The tax was struck down by the Supreme Court because it was a "deliberate and calculated device in the guise of a tax," enacted "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 250-51. The history and setting of the gross receipts tax showed that the law had been passed for this purpose because the large newspapers were carrying

the banner of the political opposition to the governor of the state, Huey Long. *See Giragi v. Moore*, 49 Ariz. 74, 85-86, 64 P.2d 819, 823 (Lockwood, J., concurring), *appeal dismissed*, 301 U.S. 670 (1937).

The Supreme Court wrote:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.
>
> * * * The tax here involved is bad not because it takes money from the pockets of the [publisher]. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.

297 U.S. at 250.[7]

Following *Grosjean*, two courts invalidated taxes as unconstitutional burdens upon freedom of the press. *Mayor of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958); *City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943). The tax struck down in *City of Tampa* was a business license tax which increased dramatically with increased circulation: a $40 tax for newspapers and periodicals with a circulation under 10,000, increasing to $500 when

[7] In interpreting the *Grosjean* case, it is also noteworthy that gross receipts taxes on advertising were relatively new tax devices and were uncommon at the time; sales and use taxes are widespread today. Conlon, *Forward*, 9 Vand. L. Rev. 121 (1956) (forward to symposium on sales and use taxation).

circulation was between 10,000 and 30,000, and finally reaching $700 when circulation rose above 30,000. The court there concluded that *Grosjean* invalidated any license tax "based on volume of circulation and graduated by scale * * *." 153 Fla. at 711, 15 So.2d at 613.

The ordinances struck down in *Mayor of Baltimore* were municipal taxes imposed upon buyers of advertising in the Baltimore media in the amount of 4% of the gross sales price and upon sellers at 2%. The court found these taxes unconstitutional because they were not ordinary or general but were single in kind, falling not upon all modes of advertising but only upon advertising in newspapers, radio, and television. 218 Md. at 288-89, 145 A.2d at 119.

In the wake of *Grosjean*, *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937), sustained a privilege tax of 1% of the gross proceeds of sales or gross income of the business of publishing newspapers, periodicals, and other publications. The court there found that the tax was a revenue-raising measure, without hostility to the press, and part of a general sales tax. 49 Ariz. at 79, 64 P. 2d at 821.

A 3% tax upon advertising that included advertising in newspapers was upheld in *Lee Enterprises, Inc. v. Iowa State Tax Commission*, 162 N.W.2d 730 (Iowa 1968). The tax at issue was part of a general revenue-raising measure imposed upon all advertisers. *Id.* at 755. So, too, in *Territory of Alaska v. Journal Printing Co.*, 135 F. Supp. 169 (D. Alaska 1955), a business license tax was upheld that is similar to the tax at issue here: printing shops and publishers of newspapers were required to pay $25 plus .5% of gross receipts in excess of $20,000. *Accord, City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56 (1953) (nominal annual business license tax); *Donnelley Corp. v. City of*

Bellevue, 283 Ky. 152, 140 S.W.2d 1024 (1940) (occupational license tax); *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958) (general gross receipts tax).

The history and setting of section 297A.14, reviewed at the start of this opinion, reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota.[8] Unlike the type of tax found to be unconstitutional in *Grosjean*, sales and use taxes are now commonplace and readily accepted. *See, e.g.*, Northrup, *The Measure of Sales Taxes*, 9 Vand. L. Rev. 238 (1956); Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 994 (1962) (hereinafter cited as *Developments*).[9] This type of taxation has no "long history of hostile misuse against the freedom of the press." *Grosjean*, 297 U.S. at 250.

Even the classification made by Minnesota's sales and use tax laws between publishers and nonpublishers does not render section 297A.14 unconstitutional under any standard of review, and in particular under the strict standard we apply here. The sales and use tax law is a revenue-raising measure.

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[8] Iowa imposes a similar tax on newsprint and ink. Iowa Code Ann. § 423.1, subd. 1 (West Supp. 1980).

[9] Indeed, what was once the major constitutional challenge to use taxation, violation of the commerce clause, is now resolved beyond doubt: "The compensating use tax is now so common that its validity has been virtually removed from the area of debate. If the burden imposed by a use tax is 'equal' to that imposed by a sales tax, the former is considered valid under the commerce clause." Note, *Economic Neutrality and the Compensating Use Tax*, 16 Stan. L. Rev. 1016, 1017 (1964) (footnote omitted).

This is perhaps the most compelling goal of a state government. Nonpublishers pay no use tax on consumption of paper and ink, but the goods they produce are subject to retail sales tax. Theoretically, the value of the paper and ink is reflected in the retail price that forms the basis of the sales tax. Newspapers and periodicals circulating at regular intervals not exceeding three months are not subject to retail sales tax. This may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items.[10] Instead of the sales tax, these items are subject to use tax. There is no reason to believe that this legislative choice is insufficiently tailored to achieve the goal of raising revenue or that it burdens the first amendment in any way whatsoever. "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized." *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940).

But respondent contends that the purpose of the use tax on paper and ink cannot be said to be raising revenue because nonpublishers are exempt. By exempting industrial users from the use tax, the legislature was acting in accordance with its general scheme to exempt component parts from the use tax when the completed product is subject to sales tax. *Stan-*

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[10] Respondents suggest that newspapers and periodicals could not constitutionally be subjected to sales tax. This issue is not before us. But we note that books, for instance, are subject to retail sales taxes, even though they are clearly protected by the first amendment. We note also that several other states apply a sales tax to newspapers. Under Okla. Stat. Ann. tit. 68, § 1305(h) (West Cum. Supp. 1980-1981), carrier sales of newspapers and periodicals made directly to consumers are exempt, but other sales of these are taxed when the sale is over 75 cents. Newsstand sales of daily publications or those issued at regular intervals not exceeding three months are taxed in Virginia, while other sales of these are exempt. Va. Code § 58-441.6(k) (1974). West Virginia, too, exempts carrier sales but not other sales. W. Va. Code § 11-15-9(12) (Cum. Supp. 1981). Sales of newspapers were taxed in Wyoming, but are now exempt. Wyo. Stat. § 39-6-405(a) (xxi) (Cum. Supp. 1981).

dard Packaging Corp. v. Commissioner of Revenue, 288 N.W. 2d 234, 237-38 (Minn. 1979).

Respondent further claims that the differing treatment under the use tax cannot be explained by reference to the different treatment under the sales tax. Respondent contends that the sales tax is paid by the consumer and the use tax by the producer. This argument is also without merit. In all cases, producers of goods are free to assume the burden of any tax or pass some part of it on to consumers in the form of higher retail prices. *See Developments*, 75 Harv. L. Rev. at 994.

Additionally, respondent claims that section 297A.14 is unconstitutional simply because publishers have been chosen as a subject of direct taxation. Respondent claims that *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944), *Jones v. City of Opelika*, 319 U.S. 103 (1943), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), establish the proposition that no first amendment activity may be taxed directly. Those cases are inapposite here. *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 313, 151 N.E. 2d 170, 176, 175 N.Y.S.2d 1, 9, *appeal dismissed*, 358 U.S. 39 (1958). Each involved a general ordinance which was applied to require distributors or nonprofit sellers of religious material to pay a fee for a license to sell or distribute their material; none considered the question of the application of an ordinary use tax to revenue-producing, commercial activity throughout the state.

III.

We now consider whether section 297A.14 is unconstitutional because it exempts from use tax the first $100,000 of paper and ink products consumed annually. The practical effect of this exemption during 1974 and 1975 was to relieve from payment of use tax all but a dozen or so publishers.

Respondent claims that the exemption discourages newspapers from increasing their circulation, inducing them to stay beneath the $100,000 paper and ink consumption level to avoid paying use tax. A passage from *Grosjean v. American Press Co.* indicates that part of the reason the Louisiana tax was repugnant to the first amendment was its effect of discouraging circulation.

> [The tax] thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid * * * it well might result in destroying both advertising and circulation.

297 U.S. at 244-45.

We have held that section 297A.14 is not a "deliberate and calculated device" to restrict circulation. But respondent claims that section 297A.14 is invalid even if the restriction of circulation is unintended. *City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943), and *Mayor of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 145 A. 2d 111 (1958), discussed above, are relied upon by respondent. The license tax in *City of Tampa* was found unconstitutional because it was graduated by volume of circulation. 153 Fla. at 711, 15 So. 2d at 613. The tax in *Mayor of Baltimore* was found unconstitutional because it singled out the media even though the court detected no "ulterior, malevolent or untoward motive," 218 Md. at 280, 145 A. 2d at 114.

Section 297A.14, when viewed in the overall scheme of the state's sales and use taxes, does not single out newspapers. Nor is the exemption in section 297A.14 literally dependent upon circulation. Indeed, the figure in section 297A.14 is only

indirectly related to circulation, if at all. Consumption of paper and ink is tied to size and number of pages as well as quantity of copies. As noted at the beginning of this opinion, circulation figures correlate with payment of the use tax only roughly. In *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), the court *upheld* a license fee imposed upon business activities including publishing. The tax consisted of a $10 fee on the first $3,000 of gross advertising receipts and $1.00 on each $1,000 above that. The *indirect* relationship to circulation that such dollar cutoffs implied was not sufficient to invalidate the tax. Accordingly, we need not invalidate a tax law which "may indirectly affect the economics of publication." *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938, 954 (D.C. Cir. 1977), *modified*, 439 U.S. 775 (1978).

Respondent also claims that section 297A.14 is flawed because it is "graduated," imposing a 0% rate on the first $100,000 of paper and ink consumed and a 4% rate thereafter. Such a "graduated" use tax, argues respondent, cannot be said to be even rationally related to the purpose of the tax.

Graduated gross sales taxes imposed upon sellers have been found to be unconstitutional. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935); *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *affirmed on remand*, 208 Minn. 607, 294 N.W. 230 (1940). In *Stewart Dry Goods*, the court found a gross sales tax, which taxed the first $400,000 of gross sales at one rate and increased the rate for each additional $100,000, up to $1,000,000, to be a denial of equal protection. It was suggested that the higher tax rates imposed upon higher volumes of gross sales were justified because the tax was a privilege tax and the value of the privilege increased when gross sales increased.

It was argued that a seller's net income and ability to pay increased as volume of sales increased. But the Court found that this alleged relationship between gross sales, ability to pay, and value of the privilege was nonexistent. Wrote the Court: "The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed." 294 U.S. at 566.

National Tea involved the invalidation in Minnesota of a similar tax imposed only upon chain stores. Chain stores were classified by gross sales into eleven categories that imposed taxes at increasing rates. As in *Stewart Dry Goods*, no relationship was found between the privilege of selling and the higher tax extracted for greater volume of selling.

We do not find the reasoning of *Stewart Dry Goods* and *National Tea* persuasive in the context of this case. Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified, as we said in Part II of this opinion, as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system.

It was suggested by the Commissioner of Revenue that the legislative choice to grant a use tax exemption for the first $100,000 of paper and ink consumed may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered). Moreover, it is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so,

the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state. "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). We do not doubt that the $100,000 exemption, in the context of the sales and use tax, does not offend first amendment rights.

We reject respondent's contention that the legislature may not create a tax exemption which favors publishing enterprises unequally. Respondent argues that *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), establishes the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." In *Buckley v. Valeo*, the Supreme Court considered the constitutionality of the numerous provisions of the Federal Election Campaign Act of 1971. The statement cited by respondent was made in connection with the Court's discussion of the provision of the Act which limited to $1,000 the contribution individuals or groups could make "relative to a clearly identified candidate." The Court found this limitation a burden on speech and association not justified by the proffered governmental interests. The above statement was made when, after rejecting the primary interest, the Court also rejected the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections," *id.* at 48.

Neither the purpose nor the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper. The expenditure limitations found unconstitutional in *Buckley* were restrictions upon the total amount of money that could be spent by persons during a campaign. Such limi-

tations were "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount. The use tax may theoretically reduce the amount of money they may spend by reducing available capital. But all taxes do as much. There is nothing special about this form of taxation which elevates to a constitutional plane these theoretical effects on "quantity" or "diversity."

In conclusion, we find that section 297A.14 offends neither the first amendment nor the equal protection clause of the fourteenth amendment. Accordingly, we reverse the judgment of the district court.

Reversed.

APPENDIX B

Transcript of Oral Argument
before Minnesota Supreme Court,
May 4, 1981

NO. 51616
STATE OF MINNESOTA
IN SUPREME COURT

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Plaintiff-Respondent,

vs.

COMMISSIONER OF REVENUE,
Defendant-Appellant.

Transcript of proceedings had in oral arguments before the Minnesota Supreme Court in the above-entitled matter on the 4th day of May, 1981, held in the courtroom of the Minnesota Supreme Court, St. Paul, Minnesota.

APPEARANCES:

Faegre & Benson, 1300 Northwestern Bank Building, Minneapolis, Minnesota 55402 by Lawrence C. Brown, Esq., appeared representing the Respondent.

Paul R. Kempainen, Esq., Special Assistant Attorney General, Department of Revenue, Centennial Office Building, St. Paul, Minnesota 55145, appeared representing the Appellant.

Chief Justice Sheran: We have the case this morning of the Minneapolis Star and Tribune Company versus the Commissioner of Revenue. Appearing for the Appellant: Paul Kempainen. For the Respondent: Lawrence Brown. You may proceed.

Mr. Kempainen: Thank you, Your Honor. If it please the court and counsel, my name is Paul Kempainen. I'm representing the Commissioner of Revenue in this case and the State of Minnesota. I certainly hope that my oral argument fulfills the needs of the court in this case. This case was originally scheduled for decision on the briefs only and non-orally, and consequently, when I finished writing my brief, like a lot of lawyers, I just put the thing out of my head and I never thought of it again until I got the notice for oral argument, so I had to practically re-study the thing from scratch.

We are here this morning to discuss the constitutionality of a statutory provision duly enacted by the legislature of this State and contained in Minnesota's General Sales and Use Tax Law. Specifically, the issue is whether the third paragraph of Minnesota Statutes Section 297A.14 is constitutional under the equal protection clauses of our State and Federal Constitu-

tions and also whether it is constitutional under the freedom of press guarantees of our State and Federal Constitutions.

The law in question was originally enacted in 1971 in the form of a use tax at the rate of four percent, which expanded the already existing use tax to impose it upon all purchases of paper and ink products used in the printing of all tax-exempt publications. This original law is still the basis of the use tax which is at issue herein, and it was, to our knowledge, never challenged in any court on constitutional grounds, and it is not—the original law—is not challenged here. What is challenged is the fact that in 1973 the legislature amended that law to provide for one hundred thousand-dollar exclusion, from the bases of the tax, to the amount of one hundred thousand dollars in purchases made annually by tax-exempt publications of paper and ink, so that in effect what was originally a use tax imposed upon the paper and ink purchases of all tax-exempt publications in the State has now been reduced to a use tax which falls upon a considerably fewer number of the tax-exempt publications in this State because of the effect of this one hundred thousand-dollar exclusion.

The basic facts of this case are essentially undisputed. There was a motion—the decision below was made on a motion for summary judgment, and there are no material facts in issue. The facts consist first of all of the legislative history of the act and also of its application to the Star and Tribune and, to the extent that the facts indicate, generally upon tax-exempt publications in this state.

To get to the legislative history of this tax in focus, it's best to go back to 1967 when the sales and use tax was originally enacted in the state of Minnesota. In that year, if the court will recall, the legislature imposed a three percent sales and use tax upon the purchases of all tangible personal property

in this state with certain exemptions which are set forth specifically in 297A.25. Those exemptions are quite wide ranging, many of them are well known, including the exemptions upon food and clothing. Another exemption was upon certain publications but not all publications in the state of Minnesota.

The definition of what were tax-exempt publications rested upon, chiefly, the periodical nature of the publication. In other words, newspapers which came out daily were tax-exempt. Most magazines which came out at bi-weekly or monthly intervals were tax-exempt and so were trade journals and advertising circulars. However, books and other types of publications which did not come out on a periodic basis were not tax-exempt and they were taxed just like any other tangible personal property in the state.

Another point about that original exemption in 1967 was that the paper and ink products going into the publication of tax-exempt publications was expressly exempted from any sales or use tax. From 1967 to 1971, therefore, there was no use tax upon paper and ink products purchased by tax-exempt publications. In 1971 the legislature enacted, in its extra session, a very comprehensive and wide-ranging reform of the overall tax structure of this state. In substance, the effect of that tax reform law was to lower the overall property tax burden across-the-board in the State of Minnesota and to make up the difference in operating revenues for local governments and for school districts which originally had gotten their income from the property tax by a comprehensive program of state government aids to those local governments and to the educational school districts. Now, naturally this called for an increase in the statewide revenues, chiefly arising from the income tax and the sales tax, and in order to find those revenues the legislature had to take some fairly drastic tax increase steps.

In 1971, in its extra session law, one of those steps was to increase the rate of the sales tax from three to four percent, but if that law is reviewed by the court, the court will notice that even that was not considered by the legislature to be enough to raise the amount of revenue which it needed in order to reform the tax structure of this State.

Some tax exemptions also were looked at by the legislature. Among those tax exemptions were those in 297A.25, not alone the one on tax-exempt publications but also on others. But the one which is at issue here before this court is the one which exempted the purchase of paper and ink products by tax-exempt publications from any tax whatsoever. In effect, in 1971 the legislature said that a tax-exempt publication, when it bought paper and ink, had to pay the four percent tax rate upon its purchases of that paper and ink. Now, there was no hundred-thousand-dollar exclusion at that time. Instead, the tax was imposed upon all tax-exempt publications, whether they were large or small or whether they were rural or urban or otherwise. It was an across-the-board tax, and to our knowledge, from 1971 to 1973 that tax was paid by all tax-exempt publications without any challenge in the courts, and certainly there was no decision on constitutional grounds regarding that tax.

In 1973 the legislature amended the law in order to provide for a one hundred thousand dollar exclusion, which, as I have explained, is based upon the first one hundred thousand dollars in annual purchases made by tax-exempt publications. This is an across-the-board exclusion or exemption, it is given to all tax-exempt publications, whether they are large or small, rural or urban.

The application of this law was relatively simple. In effect, if you're a tax-exempt publication and you went out and

bought newsprint and ink, whether you were a magazine or a trade journal, advertising circular or newspapers, you had to pay the four percent use tax upon that purchase, and in effect, because it was a use tax, the most convenient way for most publishers to pay this tax was to pay it directly to the state by simply filing returns with the State. They did not have to pay it at the time of purchase to their suppliers.

In the newspaper industry this radically reduced the number of people who actually paid the use tax, and the facts of this case point out that in 1974, which is one of the years in issue, there were a total of 388 newspapers in the State of Minnesota. Of that number, eleven had purchases in excess of one hundred thousand dollars per year on paper and ink products and therefore paid the use tax. In 1975, which is the other year in issue, there were 374 newspapers in the State of Minnesota, and of that number thirteen newspapers had purchases in excess of a hundred thousand dollars per year and therefore paid some use tax.

I wish to point out to the court, because it was alluded to by the district court below in its opinion, that there were no facts adduced at the trial court level, to my knowledge, at any rate, regarding the impact of this tax upon any other types of tax-exempt publications. Those facts were solely with regard to the newspaper industry. I point this out because on page three of its opinion the lower court said, and I quote, "publications such as magazines, trade journals and advertising circulars are less likely to reach the hundred thousand-dollar threshold of taxable consumption." Now, there are no facts in the record in order to substantiate that. If it was taken on the basis of common sense or logic or judicial notice, we would suggest to the court that common sense or logic would indicate that there's quite a few large companies in this State that are in the business of putting out trade journals and

advertising circulars and could easily go over the one hundred thousand-dollar figure, but anyway I wish to point that out in my statement of facts because there are no facts regarding the application of this one hundred thousand-dollar exclusion to other tax-exempt publications besides newspapers.

The impact upon the Star and Tribune is brought out in the record, however. From 1971 to 1973 the Star and Tribune apparently paid the tax without any question. That was during the period before the one hundred thousand-dollar exclusion. From January 1, 1974, to May 31st, 1975, which was the first year and five months of the one hundred thousand-dollar exclusion's existence, the Star and Tribune paid a total of $874,-265.04 in use tax. At that time, after paying that tax, the Star and Tribune submitted the claim for refund to the state of Minnesota. Since the end of that period of time, up until January 31st, '78, the Star and Tribune paid almost another two million dollars in use taxes, and from January, '78, until at least the time of the district court opinion below which was rendered in May of 1980 the Star and Tribune continued to pay use tax. Now, this is in addition to the use taxes paid by the other newspapers in the State who have purchases over a hundred thousand dollars, and it's in addition to the use tax paid by other tax-exempt publications who have purchases over a hundred thousand dollars. So what we are talking about here is a substantial amount of revenue. We have no way of knowing at this time exactly how much, but we would estimate somewhere in the neighborhood of around ten million dollars is involved for past periods and not taking into account future revenues from this tax.

These then are the essential facts of this case regarding the law and its application, and procedurally the case began because on August 5th, 1975, the Star and Tribune filed a claim

for refund with the State of Minnesota Department of Revenue for the use taxes which it had paid. There was no challenge to the application of the law on that refund. There was, instead, —the sole basis for that refund was the constitutionality of the law itself, and because the Commissioner of Revenue is an administrative officer who does not feel that he has it within his powers to declare a law unconstitutional, he therefore denied that refund immediately and the next day he sent out notice of that denial to the Star and Tribune. That denial of that refund was appealed to the District Court by the Star and Tribune which it had a right to do under the procedures, it was appealed to the Hennepin County District Court on August 27th, 1975, an answer was interposed by the State of Minnesota through its Commissioner of Revenue, and eventually on January 25th, 1980, the Star and Tribune filed its motion for Summary Judgment. The hearing was held before the Honorable Judge Barbeau of the Hennepin County District Court on March 31, 1980. At that hearing on behalf of the State of Minnesota I made a cross-motion for summary judgment in favor of the State of Minnesota on this matter. On May 30th, 1980, the District Court issued its decision granting summary judgment to the Star and Tribune, holding that the law was unconstitutional upon three grounds:

Number one, because it was a denial of the equal protection guarantees under the any rational basis standard. Secondly, because it was a denial of equal protection under the strict scrutiny standard of review, and thirdly, because it was a denial of the freedom of press guarantees of the first amendment as applied to the states through the fourteenth amendment of the United States Constitution and also of the freedom of press guarantees in the Minnesota Constitution.

The State has brought this appeal because we think the District Court erred in its ruling. We feel that the law is consti-

tutional under the well settled standards of constitutional review, including but not limited to the fact that every presumption is made in favor of the constitutionality of the statute, the burden is upon the taxpayer in order to prove that it's unconstitutional beyond a reasonable doubt, and finally, the fact that the State Legislatures have a wide degree of discretion and flexibility under our constitutions in order to structure those flexible and appropriate schemes of taxation which are best suited to the needs of their States and their people.

Alternatively, if the statute is declared unconstitutional, on the first ground mentioned by the District Court, namely, equal protection, any rational basis, we feel that the decision should be limited to that ground alone and that the courts should follow the traditional and well settled rule of judicial restraint and base its decision upon statutory constitutionality upon the narrowest constitutional ground possible.

Chief Justice Sheran: Counsel, I think, before you leave, that you now are at the point which in my judgment at least accounts for our being here for oral argument, and it might help if I give you some impressions that I have at this moment which are probably no more than that.

Mr. Kempainen: I appreciate that, Your Honor.

Chief Justice Sheran: My impression is that the *Grosjean* case* has no application to our problem here because there there appeared to be a deliberate purposeful attempt to use the power of taxation to control the press. I don't see that as being the case here, and my impression is that the purpose of this is, fairly clearly enough, revenue raising as distinguished from expression controlling. However, the operative effect of the act is to favor the small publishers as against large ones in the sense that the level of exemption from the tax

* [*Grosjean v. American Press Co.*, 297 U.S. 233 (1936).]

benefits the weekly newspapers; for example, the daily newspapers with large circulations pay the tax; the others do not. And that brings us to the question then of how we test this kind of a taxing scheme on constitutional grounds, and if the *Cloverleaf** case applies, then to me the law is clearly constitutional, because any rational basis will insulate against an equal protection claim under the *Cloverleaf* doctrine.

Then the question is: "Is a more careful analysis of the law called for under the clear sc utiny test?" and my impression at the moment is that a taxing law which impacts on the operation of newspapers probably should be examined closely lest the unintended impact of it is to interfere in a significant way with the circulation of printed materials. If I'm right in that, and I suggest that only tentatively, then the question is will this law stand strict scrutiny, and in my judgment it will if there are some strong and compelling reasons why the legislature would accord what is in effect an advantage to the weekly newspapers as against the daily newspapers, and in part that could be because the weekly newspapers are less able to bear the burden of the tax or because there's difficulties of collection, by analogy, to other exemptions that occur in other areas which are not intended to help or hurt anybody, but merely facilitate the administration of the law.

So given those impressions, as I've stated to you, I think it will be clear to you that, in my mind at least, that except for the strict scrutiny problem in my view the Trial Court was clearly in error. However, this law in my judgment has to stand strict scrutiny, and the question is, "can it?"

Mr. Kempainen: Well, Your Honor, our primary position on the strict scrutiny issue is that strict scrutiny simply doesn't

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* [*State of Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).]

apply here—the test—and I would like to address that briefly before I get into whether or not the statute can withstand strict scrutiny. I would like to preface my remarks by saying I think the District Court was probably correct when it said in its opinion that few statutes can withstand the strict scrutiny standard of review. It's a very high standard. It requires not just any state interest; it requires a compelling state interest, and as this Court pointed out—I believe it was in the *Fifth Congressional District Independent Republican Party** case—under the strict scrutiny standard of review, not only must there be a compelling state interest, but the statute must be precisely drafted and created in order to meet that compelling state interest, and if it goes beyond that, even to a small degree, then it doesn't hold up under the strict scrutiny standard of review.

Having prefaced my remarks with my impressions upon that strict scrutiny standard, I would like to launch into why I think the strict scrutiny standard of review does not apply here. We feel that in order to apply the strict scrutiny standard of review to tax laws which impose upon first amendment—simply affect first amendment—protected activities, is to subject virtually every tax law, in fact virtually every law enacted by the States and the federal government to a strict scrutiny standard of review as they apply to first amendment-protected activities, whether it be parking regulations or labor laws or, for that matter, the property taxes and income taxes which the Star and Tribune admits are, in this case, are properly imposed upon it.

If the test for applying strict scrutiny is simply affecting the newspaper industry, then the property tax obviously

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* [*Minnesota Fifth Congressional District Independent-Republican Party v. State*, 295 N.W.2d 650 (Minn. 1980).]

affects the newspaper industry. Very indirectly it affects the circulation, because in order to have a large circulation, you have to have a large building. You have to have more real property. Your property taxes go up. And in effect that property tax therefore has an indirect effect upon the circulation of the newspaper.

Another example is the gasoline excise tax. In order to distribute the newspapers from the loading dock of the newspaper out to the news boys and distribute them around, you have to have trucks that buy gasoline, and those trucks which buy gasoline are just as much subject to the gasoline excise tax as any other citizen in the State.

It adds to the cost of producing the newspaper and circulating it, and yet there is no question, or I don't believe there would be, that the gasoline excise tax is a general tax which would hold up under constitutional review.

So what we have here, I believe, is the Star and Tribune taking the position that simply because the law affects a first amendment-protected activity, then it's subjected to strict scrutiny standard of review. But if the District Court is correct in saying that few laws can withstand that strict scrutiny standard of review, then we are in a very difficult position indeed, because very few laws will be able to handle that standard. It's a very high standard.

Justice Peterson: Supposing the gasoline excise tax was made applicable only to publication companies that used in excess of a certain number of gallons of gasoline?

Mr. Kempainen: Well, in that case, Your Honor, there would be no question that—you know, that would be aimed precisely at, you know, the publication industry, and one of our positions in this case is that this tax is not aimed precisely at the publication industry. It's a part of the general sales and use tax statutes, and it's simply an elimination of one of

the exemptions which had originally been granted under the general sales tax law. It's not a statute or a tax that stands upon its own. It's a part of the general overall scheme, and it's tied into the general sales tax rate. The legislature couldn't raise the rate of this tax on newsprint and ink unless it raised the overall general use tax and sales tax as well, so our contention in this case, Your Honor, is that it's not aimed precisely at publications. It's simply an elimination of an exemption which had previously been granted to them for whatever reasons the legislature sought to give it, and now those publications are subject to the same taxes as all other businesses in the State of Minnesota.

Justice Wahl: But, counsel, it is aimed precisely at the largest thirteen publishers?

Mr. Kempainen: By reason of the one hundred thousand-dollar exclusion, Your Honor, it's our point that it's not aimed at those publications, because those publications are just as much entitled to that exclusion as any other publications. It's a rule of equal application. And the equal protection standard of review requires only equal rules, not necessarily equal results. In fact I might point out that some of the large newspapers in this state, as the facts of this case show, in actual fact had more than just one one-hundred thousand-dollar exemption. The Star and Tribune itself gets two of them: one for its morning edition and one for its evening edition, and there's no question that that's correct, the commissioner has allowed that interpretation of the statute, so the Star and Tribune and all the other newspapers that end up paying some tax get the same benefits of this exclusion as any other taxpayers.

Justice Scott: Counsel, does the record contain any information about the background of this amendment in '73?

Mr. Kempainen: No, Your Honor, the best that I was able to find out—and this isn't in the record; this is my own personal statement to the court—the best that I was able to find out is that this provision was put into the 1973 tax law at a very late stage in the legislative session, and exactly when, I was not able to pinpoint, but the record does not give any indication as to the reasons why.

Justice Peterson: Counsel, do I understand correctly that the tax on ink and newsprint applies to all kinds of publications, trade journals and house organs, that sort of thing?

Mr. Kempainen: Yes, Your Honor. If they come within the definition of tax-exempt publications, which includes more than just newspapers. It includes advertising circulars, it includes trade journals, magazines. I believe the—I can't remember the exact limitation; I believe it's anything which is put out at a periodic basis, quarterly or less.

Justice Peterson: So that they are tax-exempt on their ink and newsprint unless they reach that hundred thousand-dollar threshold.

Mr. Kempainen: That's correct, Your Honor.

Justice Peterson: Judge Barbeau took judicial notice that there were no such, and used some force, and certainly at first blush that judicial notice is questionable in my mind. However, the fact is easily ascertainable. Are there any other publications in the State that actually in fact pay a tax by virtue of reaching that hundred thousand-dollar —?

Mr. Kempainen: I can only give you the substance of my conversation with certain examiners in the Minnesota Department of Revenue, and it's not a part of the record, Your Honor, but there are in fact large companies in the State who, for purposes of advertising circulars and so forth, do purchase large amounts of paper and ink and do exceed the one hundred thousand-dollar exemption.

Justice Peterson: Trade journals and advertising is commercial speech which is protectable under the first amendment. Are they not different in degree, however, from the role of a newspaper of general news in first amendment thinking?

Mr. Kempainen: If Your Honor's question is asking for a difference in the test on first amendment grounds between commercial speech and straight news speech, I'm afraid I haven't studied that and I wouldn't care to comment upon it authoritatively.

And with regard to the strict scrutiny standard of review, I would like to point out to the court, however, that we feel that the correct test of whether or not this standard of review comes into play is not simply when any law affects a first amendment protected activity. We are in agreement with the United States Supreme Court when it said in *Massachusetts Board of Retirement* v. *Murgia** that it only comes into play when it "impermissibly interferes with the actual exercise of a first amendment right or other fundamental right." Now, this is a slightly higher standard and we think it's the correct one to apply. In this case we don't feel that this tax impermissibly or otherwise interferes with the actual exercise of the newspaper's right to do business or any other tax-exempt publication's right to do business. I would like to point out that it is not a license tax, it is not a license fee. It is not imposed upon the privilege of doing business in the State of Minnesota. It is not imposed, it does not purport to take away or to grant the right of doing business in the State of Minnesota and it does not subject the publishing industry to any form of regulation whatsoever other than that which

* [*Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).]

is simply necessary for collecting the tax itself, namely the filing of the tax return. This is not like the types of taxes which have been struck down in the past when they apply to the newspaper industry, including the tax in the *Grosjean* v. *American Press Company* case. That was a license tax. It was in the statute expressly imposed for the privilege of doing business.

And the other cases which have been cited in the briefs, those taxes which have been struck down are almost invariably license taxes or fees imposed for the privilege of doing business.

If the Star and Tribune chose not to impose this tax, it wouldn't be forced out of business by the State of Minnesota. It would be simply subjected to the same collection procedures and civil penalties that any other sales tax or use taxpayer in this State would be subjected to. So therefore we simply do not think that the strict scrutiny standard of review comes into play in this case, and because it does not come into play, therefore we don't need to apply it to this statute. If it were applied, then I would have to submit that it would be—I would probably have to admit that it would be very difficult to uphold this particular statute under the strict scrutiny standard of review. It would not be impossible —

Justice Otis: What's the apparent reason for exempting newspapers from that?

Mr. Kempainen: Many reasons can come into effect, Your Honor. First of all, this is the United States of America, we have a long history in this country of respecting the freedom of the press, and just on that ground alone and the political unpopularity of imposing a sales tax upon the sale of an actual newspaper would be ground enough, we believe, for any State

Legislature to exempt that sales tax. There are other grounds which I have mentioned in my brief. There's administrative convenience. Perhaps the Legislature just sought to encourage the dissemination of news. But it's very interesting that not all first amendment protected activity is exempt from the sales tax. As I've mentioned previously, there are books, other than school books, which is a separate classification in and of itself again, that are subjected, including the law books which we all read, they're subjected to the sales tax, and those books are just as much subject to first amendment protection as newspapers.

Justice Otis: But the Legislature didn't seem inhibited when it came to income taxes and property taxes.

Mr. Kempainen: That's correct, Your Honor, perhaps because the sales tax is imposed more directly upon the actual consumer as he buys his newspaper. You would actually have to fork over the tax at the same time that he buys the newspaper, whereas the property tax and the income tax and any other form of taxation is more indirect, and eventually, to be perfectly honest, the reality is that the economic burden of taxes—whether it's imposed in the newspaper industry or any other sort of industry—is passed on to the ultimate consumer. I think that's a matter of common knowledge.

I thank you, Your Honor. In substance we simply feel that this law is constitutional, and the judgment of the District Court below should be reversed and summary judgment granted in favor of the State of Minnesota.

Mr. Brown: Mr. Chief Justice?

Chief Justice Sheran: Mr. Brown, lest the comments that I make might throw you off from a pattern that you had planned for your argument, I would want to make it clear that the views that I expressed are merely impressions and

mine only; they don't represent the views of the court or anybody other than myself. Nevertheless, for what it's worth, my impression is that there would be no possibility of sustaining the decision of the Trial Court in this matter unless the principle of strict scrutiny applies, and there there would be no possibility of upholding the decision of the Trial Court in this matter unless, examining the law strictly, analyzing its impact so far as the record permits us to analyze it in the real world, we were to be left with the impression that the Legislature, even though unintentionally, has done what *Grosjean* forbids and that is to put a burden on the printed media, which it, although intended as a tax, is going to interfere in some significant way with their operations, and I might add that I have difficulty seeing that this does. To me, this looks like purely a revenue measure, and that the exemption of a hundred thousand dollars and below has a rational, reasonable persuasive basis in fact in the real world, and on that grounds my impression is—this is purely personal and it's only an impression—is that the decision of the Trial Court should be reversed, so I mention that to you so you can take measure of where we're at here, at least in my mind.

Mr. Brown: Your Honor, I'll certainly try not to disregard those comments as I address the issues in this case.

Let me speak first about the record of this case. If the record is incomplete in any respect, that is my fault, because that record was created solely by counsel for Star and Tribune. There is no fact of record that was not submitted in support of our summary judgment motion. There was no fact submitted or suggested to the contrary by counsel for the State. All of the facts are undisputed.

The second point I want to make is there is no legislative history that would give us any insight, pro or con, to the

evolution of the taxing scheme from the sales tax in '67 to the use tax in '71 to the one hundred thousand dollar exemption in '73. Of record there is no factual basis upon which this Court can say that the Legislature was or was not acting in any discriminatory, as an intentional matter, way, going after the big newspapers. But the fact of the matter is that that's who it hits, and that's not a fact that can be contested on the record.

Justice Otis: I'm having trouble, Mr. Brown. Had the exemption been denied to large newspapers and granted to small ones, you would have a pretty good case, but I can't see how they were discriminated against when they all get the benefit of the hundred thousand dollar exemption.

Mr. Brown: Let me respond directly to that. We argued in part that this statute was unconstitutional under the Minnesota constitution's uniformity of taxation clause. When it was submitted to the lower court, Justice Wahl had recently written or was about to write the opinion in the *Minnesota Cable** case which held the statute there, a tax statute, unconstitutional under the state uniformity clause. It was a tax which fell on 112 cable systems but six were exempt. Here, you have a tax that literally falls on 350 to 400 newspapers, only three percent of which pay the tax. I happen to be —

Justice Todd: But aren't all exempt?

Mr. Brown: Your Honor, they are —

Justice Todd: If you're distinguishing from *Cable*? I mean I don't see where *Cable* falls in, because in *Cable* there wasn't a uniform application. That was the problem with *Cable*.

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* [*Minnesota Cable Communications Association, Inc. v. Minnesota Cable Communications Board*, 288 N.W.2d 721 (Minn. 1980).]

Mr. Brown: Your Honor is quite right. In the *Cable* case six were totally exempted because the moneys they were paying went elsewhere. I don't wish to give you a corny example, but the fact of the matter is, from our viewpoint, the way this exemption works in the real world is it's like a blade six feet over your head, and you walk underneath the blade, and if your hands are beneath six feet off the ground, you don't get cut. But if you're up above six feet, you get cut by the tax because that's where the impact fits in. Now, that is one of the two discriminations.

Justice Todd: Is that any different, counsel, from the homestead exemption?

Mr. Brown: Yes, it is, Your Honor.

Justice Todd: If my house is cheap enough, I get by pretty good. If I got a big, fancy house, I don't get by and my hands stick up above the blade.

Mr. Brown: Your Honor, the social policy, I believe, that underlies the homestead exemption, namely the encouragement of citizens of this State to own their own home, is not present in this case in any way, and I believe that is grounds legitimately for distinguishing that exemption which I wouldn't be arguing against.

The next point I would like to make, Your Honors, is that this is a tax on the only two physical components of a newspaper. A newspaper consists of newspaper and ink, and the record reflects those costs in the percentages that wind up in the published newspaper that you may read every day. The State has suggested —

Justice Todd: You're not disputing, counsel, that you have to pay a tax when you buy a press or you buy the new computerized —

Mr. Brown: No, Your Honor.

Justice Todd: — Things that each reporter now has that makes up the paper and this is the mechanism for making it visible, but the makeup of the paper is done now with a nice little computer screen and lithographers no longer have a job and you pay tax on that, and that's more to do with the paper than the print and ink.

Mr. Brown: Your Honor, we tried to make it clear through the record that the Star and Tribune is a good dues-paying tax-paying citizen of the State of Minnesota and it pays all generally applicable taxes — that is, generally applicable to businesses. It pays an income tax. It pays property taxes and we don't dispute that. The vice of this tax, from our viewpoint, is that it is a direct tax on the two components of the newspaper, and as such, it becomes a direct tax on the act of communicating news and information through the vehicle of the newspaper.

I happen to disagree with the Chief Justice's initial impression, and I would like to simply mention that in our view, Your Honor, under the first amendment freedom of the press point, it isn't the act of a Legislature intending to discriminate against the press that results in freedom of the press being infringed. The intentions of the Legislature, I believe, are immaterial. In *Grosjean*, that was present. It was a very unusual case in its factual setting coming as it did out of a highly political situation in Louisiana. However, as we cite on page 49 of our Trial Court brief, in the *City of Tampa** case, the Supreme Court of Florida made the very point, contrary to Your Honor's impression, that the arbitrariness or the unreasonableness of the tax or the motivations underlying its enactment are immaterial. What is material, I suggest, Your Honor, is what does the tax do? What does it impact? And if

* [*City of Tampa v. Tampa Times*, 15 So.2d 612 (Fla. 1943).]

it impacts a first amendment right—here, the exercise of the freedom of the press—then two things follow: first of all, I do believe it follows that you do have a first amendment issue confronting the Court that ought to be resolved as the Trial Court did. But secondly, I believe in this case that under the equal protection challenge, strict scrutiny is the appropriate test. This Court last fall came out with two tax opinions, the last of which was Justice Simonett's opinion in the *Guilliams** case, and in that case, which was argued the morning I was here, Mr. Kempainen made the point that is picked up in the opinion that in *Guilliams* you did not have a fundamental constitutional right involved. You were dealing strictly with tax classifications in an equal protection environment where the strict scrutiny standard wasn't present, and as the opinion reflects, this Court specifically disclaimed the presence of a fundamental constitutional right as part of its grounds for upholding the constitutionality of that statute, and freedom of the press was one of them that you mentioned.

Justice Scott: Counsel, wouldn't that argument apply to the '71 law, too?

Mr. Brown: Your Honor, I think this entire use tax could have been challenged before it was in this case. It is my view that this use tax imposed without the exclusion violates freedom of the press. It also violates in my view the equal protection standards, because what the Legislature did—

Justice Scott: But getting back to the fundamental constitutional right, how did the '71 amendment interfere with the right to do business?

Mr. Brown: The 1971 amendment which imposed the use tax on the consumption of paper and ink, used in making a

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* [*Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138 (Minn. 1980).]

newspaper, which levied first a three and then later a four percent tax on paper and ink, was the same direct tax, Justice Scott, that we have here in this case, the only difference being that in 1973 the Legislature added the one hundred thousand-dollar exclusion.

Justice Scott: So you're saying they reduced the tax?

Mr. Brown: The net effect is to reduce the tax, and it can't be justified on a revenue-raising measure.

Justice Todd: Counsel, while we're on it, can I ask a question? If we deal with the '71 amendment, then we don't have an equal protection argument.

Mr. Brown: No, Your Honor, that's not correct. There are two levels of classification that we have attacked, and the trial court agreed with both of our arguments. The first classification that we attacked is the distinction between industrial users of paper and ink. They aren't subjected to any use tax at all. They have a sales tax—

Justice Todd: Wait a minute. Now you're wandering into another field because those are decisions that end up because they ultimately are charged that tax. It's part of the cost of production. Now, to argue that they don't pay the tax is to ignore the realities. I don't — I think you're being a little — because that's in the *Mankato Press** case, it's in all those old tax cases that say when you buy things and eventually sell the final product and charge a sales tax on the final product, all the cost components get taxed on down the line.

What I'm interested in is in your first amendment you want to superimpose upon this thing, and I just—I guess we just disagree with the equal protection, but assume it's not there. If you're saying the first amendment superimposes something on this, what different argument would you make if we were

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* [*Midwestern Press Inc. v. Commissioner of Taxation*, 295 Minn. 530, 203 N.W.2d 344 (1972).]

here considering the income tax, property tax, any tax? What different argument would you make absent equal protection if you're going to superimpose first amendment as being the real infringement here?

Mr. Brown: Your Honor, I'm going to try to be responsive, and I hope, if I fail, it isn't read as an intention to avoid. If we were here talking about an income tax and making a first amendment right argument, in all honesty I wouldn't be here because a graduated income tax, as you well know, is after deductions for costs and expenses. It is based on net taxable income. The tax here is a tax that is paid by the user of the paper and ink products. It is a direct tax without regard to ability to pay. The Star and Tribune could be awash in red ink —

Justice Todd: Well, let's talk about property tax then.

Mr. Brown: All right.

Justice Todd: That's not based on ability to pay.

Mr. Brown: Property tax is based rather on the assumption of a value and an assumption drawn from the assumption of value that if you own an asset that is valuable, you have an ability to pay. That is not the basis for this tax. The sales tax is not paid by the seller. The sales tax is added to the price the seller charges the public. It is collected and then refunded. This tax, the use tax, its very concept: it is a tax that is paid by the user and consumer of the articles taxed, and it is that point, I respectfully submit, that establishes our argument in part that this is a direct tax on the articles that make up the newspaper, and as a consequence, you are confronted with a legitimate first amendment concern.

Justice Sheran had asked what justifications could there be for this taxing scheme under the strict scrutiny standard?

I suggest to you, Your Honors, there is none of record. There is no fact that can be pointed to of record that would justify either the tax or the one hundred thousand-dollar exclusion. It isn't a revenue-raising measure to exclude up to four thousand dollars a year of use tax, and yet the impact of that on publications alone is in excess of a million dollars of lost revenues as a result of the hundred thousand-dollar exclusion, because in the years in question — 1974 and '75 —

(Whereupon, the cassette tape, from which this transcription was made, was switched from side 1 to side 2, losing some verbalization in the switching process, and the oral argument resumed with Mr. Lawrence Brown responding, as follows:)

Mr. Brown: The hundred thousand-dollar exclusion paid no use tax at all on paper and ink.

Justice Otis: Well, counsel, sorry to interrupt, but the realities are, it seems to me, or I'll ask you, that publishers are not going to restrict their circulation because they get into a non-exempt bracket. What real impact is there on the Minneapolis papers by having to pay a tax that some others don't? The scope of their news coverage, the scope of their circulation, the depth of their reporting or any other aspect of their business in reality?

Mr. Brown: Mr. Justice Otis, I would suggest that the answer to that is that it's analogous to having a little bit of cancer. A little bit of cancer won't kill you. But what's the impact of four percent? If that's legitimate, how about five or ten or twenty? That's the parade of horribles argument that the first amendment was intended to nip in the bud. This Court said, in the *Fifth District* case, that any interference—it didn't say the magnitude of the interference; it said "any interference" with a fundamental right, first amendment, is impermissible—that's an unqualified word—if it is

not necessary to the accomplishing of a compelling state interest. Now, I have challenged the State in the court below and again here before Your Honors. I see no interest of the State at all, much less a compelling one, either to tax, without exclusion, the paper and ink products that are consumed in the publication of a newspaper, but going beyond that, if I lose on that one, what of record interest, if any, is there in the State in granting an exclusion that effectively, in the real world, exempts all but three percent of the potential taxpayers of the tax? I suggest there is none.

Justice Peterson: Let me just—this may turn out to be a question or it may be only a rumination, but it tends to isolate the first amendment issue from the equal protection issue in this case, although I recognize that the two may very much become intertwined. The '71 tax taxed all newspapers, and there was no claim at that point of a first amendment violation, which isn't dispositive, but significant in terms of the history of the news media being quick to assert first amendment in the book print and electronic media against government regulation, government tax and that sort of thing.

You have the situation here where, in terms of competitive voices for the eye and the ear, the large publishers are not in that way being really competitively disadvantaged for their right to speak or to print. To the extent, for example, that, in the noncompetitive situation in Minneapolis, the large papers are these respondents. If there's any competition, it's with the St. Paul papers, and they, too, are paying it, and it isn't that the news isn't being heard in the land because to the extent that it favors—now we get to the equal protection—to the extent that it favors the small, it is making possible more voices to be heard and views to be printed and seen, and that result is certainly not violative of the first amendment,

but serves what we have conceived its historic purposes, of many voices being heard; that it is really consistent with first amendment to ease the burden of the small so that they may exist along with the large.

All right. That was too long.

Mr. Brown: Well, Your Honor, within the rumination there were some questions and let me see if I can respond to a couple of them. First of all, I know of no constitutional decision in this country that holds that the act of a Legislature to encourage the exercise of a fundamental constitutional right is itself unconstitutional. These issues, as you can appreciate, only come up when there is at least a perceived infringement or repression of the exercise of freedom of the press, for example.

In the *Grosjean* case, which Chief Justice Sheran suggests is not applicable, that case was resolved in the District Court on equal protection grounds. It was resolved by the U. S. Supreme Court on first amendment freedom of the press grounds, and the crux of the holding is that the taxing statute there was held to have a direct tendency to restrict circulation. Now, in Your Honor's questions and ruminations you suggest an evening up of the battle in the competition in the news area. My response to Your Honor's suggestion there is simply this: that is not, in my view, the way freedom of the press is viewed by the United States Supreme Court. It is not the burden of a party whose first amendment rights have been stepped on, so to speak.

Justice Peterson: You don't increase another man's rights by diminishing yours.

Mr. Brown: Correct, Your Honor, and that's my point. And here we believe, and I really don't know where I am in my time, I've lost track, but we could go on and discuss these

interesting and important issues. I guess if I'm near the end of my time I would like to close, subject to any questions you have, with this point: *Grosjean* was decided in 1936. It is still the law of this land and it is good law, because it protects even the inadvertent acts of legislative bodies where their acts impose restraints or restrictions on the exercise of freedom of the press. That is the focus of the first amendment argument. The focus is not whether people can compete better or worse, whether people should have a better right to publish newspapers or a less expensive ability in the rural areas. If you find, as I think you must, that this tax is a direct tax on the exercise of freedom of the press, which it is, then at the least you must address the equal protection argument under the strict scrutiny standard, not only to be in accord with the United States Supreme Court's pronouncements but your own as late as last fall. We are here also to try to have this statute declared unconstitutional on the pure equal protection argument that we have made, and Mr. Justice Todd, I think in the context of this case, the *Cable* case is applicable. The standards of the *Cable* case are applicable, and the result as to the one hundred thousand-dollar exclusion here should be the same result reached in the *Cable* case; the whole statute should be held unconstitutional.

Justice Scott: The only practical problem, counsel, with that, would be that then the legislative answer would be to just remove the hundred thousand and you would pay more taxes.

Mr. Brown: Your Honor, if that is the prospective way the legislature wishes to treat the problem, that's a day for another lawsuit because you still would have the first amendment issue present. That can't obtain here because there have been hundreds of potential taxpayers who have never paid

the tax and the same severance issue was raised in the *Cable* case, and as this Court's opinion reflects, it was not a sufficient remedy to simply excise the offending portion because it was so integral to the whole statute itself.

Justice Peterson: It would take another minute, I suppose, if I ask you this question. You're talking in terms of its effect, direct or indirect. That being so, why should it be different whether the tax is direct or indirect?

Mr. Brown: Your Honor, I don't think it should, but the cases seem to say — they use language about a direct impact or a restriction upon a fundamental right. Here, it's suggested in the State's argument that the four percent sales tax could have been constitutionally imposed on the act of communication when the newspaper is transferred from the publisher to the reader. That is in their brief and they argue that that would have been constitutional. We don't believe that at all. But that is used to support the argument that what is done here indirectly, through the use tax on the two components of the newspaper, is constitutional because it is lesser than the greater. Our view is that — and we set out in the record — it was mooted by the argument the State made — we set out to create a factual record, because of the case law as we perceived it, to show a direct relationship between the tax on the two components irrespective of ability to pay, irrespective of income, having an impact on the communicative act of the transfer of the newspaper from the publisher to the reader. Then the State came along and said 'well, we could have imposed a sales tax on it anyway,' so really that's in our proof portion of the case, we got superseded a little bit by the subsequent argument that was made, but the cases seem to turn — maybe it's semantical — but they seem to always turn on whether or not there's been a direct infringe-

ment on a constitutionally protected right and that's why we argued it that way.

Chief Justice Sheran: Your case, in so far as it's based on federal constitutional grounds, entitles you to seek review in the United States Supreme Court should the decision of this Court with respect to the matter be adverse and unsatisfactory, does it not?

Mr. Brown: I believe it does, Your Honor.

Chief Justice Sheran: There's nothing in the posture of this case that makes this necessarily the final arbiter of where we're at on this issue.

Mr. Brown: It does not, Your Honor, although our client's interests, as distinguished from my own professional desires, are somewhat at conflict at that point. Our client would like this Court to be the final arbiter and hold the statute unconstitutional on the grounds that we have suggested. I would say, Your Honor, that this Court has held, as recently as a year and a half ago, that the constitutional standards of our Constitution may be higher than those of the Federal Constitution in these fundamental rights cases, and therefore this Court is in a position to give greater protection to citizens of this State than would the United States Supreme Court, not to suggest they would be less, but your hands aren't tied simply because we have argued alternatively State and then Federal Constitutional grounds.

Chief Justice Sheran: Thank you, counsel. I think we have the issues in this case pretty well in mind, unless there's some —we'll move on then to the next case.

(Whereupon, the hearing was concluded.)

Certificate of Court Reporter

I, Warren L. Jones, registered professional court reporter, certify that I recorded verbatim by stenotype from a taped recording the proceedings of the preceding 39 pages.

I further certify that the foregoing verbatim transcript constitutes a full, accurate and complete record of said proceedings.

Given under my hand this 17th day of February, 1982, at Minneapolis, Minnesota.

/s/ Warren L. Jones, Rpr

APPENDIX C

Order and Memorandum of
Hennepin County District Court
Judge Donald T. Barbeau,
Dated May 30, 1980

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

File No. 718018

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Plaintiff,

vs.

COMMISSIONER OF REVENUE,
Defendant.

ORDER

The above-entitled matter came on for hearing before the undersigned, one of the judges of the above-named Court, on

the 31st day of March, 1980, upon the motion of plaintiff for an order granting summary judgment.

Paul R. Kempainen, Esq., Special Assistant Attorney General, appeared for and on behalf of the Defendant Commissioner of Revenue, who was also represented by C. H. Luther, Deputy Attorney General. Lawrence C. Brown, John K. Steffen and John Borger appeared for and on behalf of Plaintiff Minneapolis Star and Tribune Company.

The Court, having heard the arguments of counsel and being fully advised in the premises, upon all the files, records and proceedings in this action, has determined that there are no genuine issues as to any material facts and that plaintiff is entitled to the relief prayed for in its complaint as a matter of law. Accordingly,

IT IS HEREBY ORDERED:

That the motion of plaintiff for summary judgment be and the same hereby is granted in its entirety; that Minn. Stat. §297A.14, to the extent that it imposes a tax upon consumption of paper and ink products used to produce publications, be and the same hereby is declared unconstitutional as a denial of equal protection of the laws in violation of Article I, Section 2 and Article X, Section 1 of the Minnesota Constitution and in violation of the Fourteenth Amendment to the Constitution of the United States and as an abridgement of freedom of the press in violation of Article I, Section 3 of the Minnesota Constitution and in violation of the First and Fourteenth Amendments to the Constitution of the United States; and that defendant be and hereby is ordered to return to plaintiff the amount of $874,265.04 with interest thereon as provided by law. Plaintiff is allowed its costs.

By the Court:

DONALD T. BARBEAU

Judge of District Court

Dated: May 30, 1980.

Stay Entry of Judgment 30 days.

MEMORANDUM

STATEMENT OF THE CASE

This case is a tax matter involving the constitutionality of that part of Minnesota's general sales and use tax law, specifically, the third paragraph of Minnesota Statute 297A.14 which imposes a four percent use tax upon the cost of purchasing paper and ink products used in producing any publication which is exempt from the sales and use tax. The same statute also provides that the first $100,000 in such purchases each year shall not be taxed.

The State contends that the plaintiff, the Minneapolis Star and Tribune Company, is subject to this use tax because it purchases paper and ink products for use in printing its newspapers.

During certain taxable periods in question the Star Tribune paid the use taxes allegedly due under Minnesota Statute 297A.14 and subsequently filed a refund claim with the Minnesota Department of Revenue. The basis for said refund claim had to do with the alleged unconstitutionality of the statute itself. The Department of Revenue immediately denied the Star Tribune's application.

The Star Tribune thereupon commenced this action on August 27, 1975, as an appeal from the Commissioner's denial. The defendant, Commissioner of Revenue, duly interposed his Answer to plaintiff's Summons and Complaint on September 2, 1975.

The matter came before the Court for summary judgment sought by both parties which was heard by this Court in oral argument on March 31, 1980.

In seeking summary judgment the Star Tribune presents three constitutional challenges to the 4% use tax on paper and ink products consumed in the production of publications:

First, it discriminates without any rational basis against publishers of large-circulation Minnesota newspapers, and accordingly denies Star Tribune equal protection of the laws in violations of the Minnesota and United States Constitutions.

Second, it discriminates against such publishers' constitutionally protected right of freedom of the press in a manner not necessary to accomplish any compelling state interest, and as such, it denies Star Tribune equal protection of the laws in violation of the Minnesota and United States Constitutions.

Third, it abridges Star Tribune's constitutionally protected right of freedom of the press in violation of the Minnesota and United States Constitutions.

During the time period in question, viz., January 1, 1974, through May 31, 1975, Star Tribune paid an aggregate of $874,265.04 in use taxes on its purchases of paper and ink products.

As the result of actions of the Minnesota Legislature in 1967, 1971 and 1973, the use tax on the consumption of paper and ink products was variously imposed as follows:

1. From 1967-1971, there was no use tax imposed on the consumption of paper and ink products to produce other products; other industrial users and producers of publications received equal treatment—no use tax.

2. From November 1, 1971—December 31, 1973, producers of publications who consumed paper and ink products in producing publications were treated differently from other industrial users; only producers of publications were subject to the use tax.

3. Commencing January 1, 1974, the disparate use tax treatment of producers of publications and other industrial

users continued. In addition, however, producers of publications as a class now received disparate use tax treatment among the class members depending upon the amount of paper and ink products they consumed in producing their publications: those who consumed less than $100,000 of paper and ink products annually paid no use tax, whereas those whose consumption of paper and ink products exceeded $100,000 paid the use tax on the excess above $100,000.

At the oral arguments and in the briefs it is admitted as an undisputed fact between the parties that the use tax imposed on paper and ink products affected only approximately 3% of all Minnesota newspaper publishers. Because publications such as magazines, trade journals and advertising circulars are less likely to reach the $100,000 threshold of taxable consumption, the percentage of all Minnesota "publications" affected by the challenged use tax probably is even less than the 3% figure. In other words, it is admitted by all parties that the "target" which is hit by this use tax is a few publishers of large-circulation Minnesota newspapers.

DISCUSSION

The statutory discrimination takes two forms: first, other industrial users of paper and ink products are not subject to the use tax, whereas publishers of large-circulation Minnesota newspapers are subject to the use tax; second, within the classification of "publications," only the large-circulation Minnesota newspapers which consume in excess of $100,000 of paper and ink products annually are subject to the use tax, while their smaller fellow publishers escape the imposition of the use tax because their annual consumption of paper and ink products does not exceed $100,000. These statutory discriminations violate Star Tribune's equal protection rights guaranteed by Article I, Section 2 and Article X, Section 1 of

the Minnesota Constitution, and the Fourteenth Amendment to the Constitution of the United States.

In addition to the unconstitutional statutory discriminations, the use tax on paper and ink products consumed in producing publications is an unconstitutional abridgment of Star Tribune's right to freedom of the press guaranteed by Article I, Section 3 of the Minnesota Constitution, and the First and Fourteenth Amendments to the Constitution of the United States.

A. The Challenged Use Tax is an Unconstitutional Denial of Equal Protection.

Equal-protection review under the "no rational basis" standard requires that, for purposes of economic regulation, statutory classifications must be "rationally related to a legitimate state interest." *Clover Leaf Creamery Co. v. State of Minnesota*, —— N.W. 2d ——, (Minn. Sept. 7, 1979). Under the equal protection guarantees of the Minnesota Constitution, the analysis:

> . . . includes three primary elements: (1) the distinctions which separate those included within the classification and those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.
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> (*Miller Brewing Co. v. State of Minnesota*, 284 N.W. 2d 353, 356 (Minn. 1979).)

Another fundamental principle of equal protection law is that "one alone may constitute a class as well as a thousand, but the fewer there are in a class, the more closely the courts will scrutinize the act to see if its classification constitutes an evasion of the constitution." *Schwartz v. Talmo*, 295 Minn. 356, 362-63, 205 N.W. 2d 318, 322-23 (1973); *Loew v. Hagerle Bros.*, 226 Minn. 485, 489, 33 N.W. 2d 598, 601 (1948). Here, the challenged use tax falls upon approximately a dozen Minnesota newspaper publishers out of all Minnesota producers of publications and thus invites close scrutiny.

The classifications used by the Legislature are neither genuine nor substantial. The challenged use tax, which distinguishes between paper and ink products consumed in producing a publication and those same products consumed in producing, for example, a printed milk carton, makes a distinction which lacks a rational basis.

The Legislature's second classification between publications, those consuming more and those consuming less than $100,000 of paper and ink products annually, is even less genuine and substantial. There are no qualitative differences between publications which consume large or small quantities of paper and ink products; all convey information on a regular basis to the general public.

In *American Press Co. v. Grosjean*, 10 F. Supp. 161, the Court invalidated a tax on advertising which applied only to publications having a circulation of more than 20,000 copies per week. The Court held that such a "big paper only" tax denied equal protection of the laws.

A statutory classification grounded upon a necessarily arbitrary drawing of a line exclusively based upon size such as the $100,000 exemption features of the challenged use tax is presumptively suspect on equal protection grounds just on the basis of common sense.

As said in *Hall Hardware Co. v. Gage,* 197 Minn. 691, 268 N.W. 202, "We cannot classify big and little taxpayers. Before the law each must stand upon his own rights and must be accorded the same treatment within the law."

Article X, Section 1 of the Minnesota Constitution expressly mandates that taxes "shall be uniform upon the same class of subjects." It logically follows that a graduated tax on gross expenses, such as the use tax on paper and ink products consumed by publications, is unconstitutional because its focus on gross expenses bears no rational relationship to ability to pay. The Ohio Supreme Court invalidated a similar tax scheme such as this in *Kroger Co. v. Schneider,* (Ohio, 1967) 223 N.E. 2d 606, as did Florida in the case of *Volusia County Kennel Club v. Haggard,* (Florida, 1973) So. 2d 884. To the same effect, see the decision of the Pennsylvania Supreme Court in *Blauner's, Inc. v. City of Philadelphia, Pa.,* 198 A. 889.

In summary, the Court finds that monetary subclassifications simply have no rational justification in the area of sales and use taxes. It singles out for discriminatory tax treatment, not even an entire industry to be taxed equally, but only a small segment of a single industry—newspaper publishers—to be taxed discriminatorily. Such arbitrary classification constitutes a denial of equal protection.

Any State purpose of burdening the publishing industry in general is obviously illegitimate and runs afoul of state and federal guarantees of freedom of the press which prohibits special taxes on the press.

Any State purpose of burdening one segment of the press—i.e., large-circulation Minnesota newspapers, as a result of the $100,000 exemption—also is illegitimate. State and Federal guarantees of free press not only prevent the State from burdening the entire press with a tax not borne by other busi-

nesses, but also bar the State from singling out particular segments of the press industry for special favors or penalties.

For example, the Illinois Supreme Court has held that a state tax provision may not discriminate between newspapers and magazines for purposes of sales and use tax exemptions for purchases of "such tangible personal property as newsprint and ink for the primary purpose of conveying news" and for the sales of news publications themselves. *Time, Inc. v. Hulman*, 201 N.E.2d 374 (Ill. 1964) (relying in part on equal protection principles).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court struck down provisions of the Federal Election Campaign Act which imposed $1,000 limits on independent expenditures to advocate the election or defeat of clearly identified candidates for federal office. The Supreme Court rejected arguments that the government had a legitimate interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. The Supreme Court stated:

> (T)he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' ". . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion . . .
>
> (424 U.S. at 48-49 (citations omitted).)

Clearly, *Buckley v. Valeo* would prohibit the State from limiting each publication's annual consumption of paper and ink products to $100,000. By choosing instead simply to tax all consumption of such products in excess of that amount, the State has taken a step which may be less drastic but is no less constitutionally invalid.

A legislative scheme which taxes the instruments of communication of some publications, but exempts others, clearly places a discriminatory burden on freedom of the press. The challenged use tax penalizes the circulation of information and ideas by large publications and creates incentives to reduce the circulation and size of publications. The fact of the tax burden, and not its amount, is the objectionable factor.

When challenged as a denial of equal protection, any governmental classification which affects First Amendment rights must withstand the "strict scrutiny" standard, which demands that the classification must be *necessary* to the *accomplishment* of a *compelling state interest. Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.3 (1976); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 704 (M.D. Fla. 1978); *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Ia. 1971).

Classifications properly subjected to the strict scrutiny standard must be "precisely tailored to serve a compelling governmental interest." *Regents of University of California v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J., concurring). States may not choose means that unnecessarily restrict

constitutionally protected liberty; rather, states must adopt the least drastic means to achieve their ends. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, ——, 59 L. Ed. 2d 230, 242 (1979). In "order to justify the use of a suspect classification, a State must show that its purpose of interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose of the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *See also Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

Thus, "relevant" under the "no rational basis" standard of review becomes "necessary" under the strict scrutiny standard, while "legitimate state interest" becomes "compelling governmental interest." In addition, in a strict scrutiny case, the State bears the burden of proof on the issues of legitimacy and substantiality of its interests and of the necessity of the challenged classification to support that interest. *Regents of University of California v. Bakke*, 438 U.S. 265, 306-18 (1978) (Powell, J.); *In re Griffiths*, 413 U.S. 717, 721-22 (1973). That burden is a heavy one.

There can be no question that the production of a publication is a clear and unquestionable exercise of the right of freedom of expression. That is a fundamental constitutional right protected by the Minnesota and United States Constitutions. Star Tribune's equal protection challenge to the use tax on paper and ink products consumed in producing a publication thus has an alternative ground. This Court must determine whether or not the Legislature's classifications incorporated in the challenged use tax will withstand "strict scrutiny" —are those classifications necessary to the accomplishment of a compelling State interest?

As discussed in Star Tribune's initial equal protection challenge to the use tax, among all industrial users of paper and ink products, producers of publications included, only those which consume those products in the production of newspapers and other publications presenting information to the general public pay the use tax. Among all publications, only those which annually consume more than $100,000 of paper and ink products pay the use tax. To obtain equal use tax treatment enjoyed by small-circulation publications and industrial users of paper and ink products, Star Tribune would have to reduce the number of pages in its publications, reduce the number of copies of its publications, reduce the frequency of its publications, or use the paper and ink products it consumes to produce something else. Each of those alternatives would significantly reduce the amount of information Star Tribune presents to the general public. Thus, each of those alternatives abridges Star Tribune's constitutionally protected right of freedom of expression.

When a classification is subject to strict scrutiny, proffered explanations of legislative purposes based on speculation and unsupported by evidence in the legislative record will not suffice. The reviewing court—this Court—should not accept generalized, after-the-fact rationalizations for legislations. *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972).

Neither the legislative taxing scheme nor the legislative history support a conclusion that the classifications of the use tax on the consumption of paper and ink products by publications were enacted to raise revenue, to counterbalance the sales-tax exemption for publications, or to reduce administrative burdens. Absent actual evidence of a proper legislative

purpose, either from legislative history or from examination of the legislative scheme itself, the classifications of the use tax must fall, and the use tax itself must fall with its classifications.

Few classifications which impair fundamental rights can survive the strict scrutiny of the Equal Protection Clause. (L. Tribe, American Constitutional Law, § 16-6 p. 1000 (1978).) The challenged use tax on the consumption of paper and ink products specifically targeted at large publications clearly is not necessary to the accomplishment of a compelling state interest.

B. The Challenged Use Tax Unconstitutionally Discriminates Against the Press in General and Against Sections of the Press in Particular.

Grosjean v. American Press Co., 297 U.S. 233 (1936), remains the leading decision concerning a state's authority to tax the press. The Louisiana legislation scrutinized in *Grosjean* imposed a license tax, amounting to 2% of gross receipts, on all sellers of advertising to be published in newspapers or magazines having a circulation of more than 20,000 copies per week. A unanimous Supreme Court invalidated the statute as an unconstitutional abridgment of freedom of the press. The Supreme Court determined that the license tax:

> operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid . . . , it well might result in destroying both advertising and circulation.
>
> (297 U.S. at 244-45.)

By comparison, during the years in question, the challenged use tax fell upon only a few daily newspapers with a circulation greater than 12,500 copies. As in *Grosjean*, the effect of the use tax is to curtail the amount of revenue realized from publishing newspapers, and the direct tendency of the use tax is to restrict circulation.

Grosjean indicated that the press was not "immune from any of the ordinary forms of taxation for the support of the government." (297 U.S. at 250.) But the Louisiana license tax was invalid because it was "single in kind," directed only at newspapers; because it was further directed at a "selected group of newspapers," with the plain purpose of penalizing their publishers and curtailing their circulation; and because the tax "limit[ed] the circulation of information to which the public is entitled in virtue of the constitutional guaranties." (297 U.S. at 250-51.)

The evil of special taxes on the press arises from the very structure of such taxes, and not from the motives of the legislators who enact the tax. In *City of Tampa v. Tampa Times*, 15 So. 2d 612 (Fla. 1943), the Supreme Court of Florida invalidated an annual city license tax on newspapers of $40 for papers with less than 10,000 circulation, of $500 for papers with circulation between 10,000 and 30,000, and of $700 for papers with circulation in excess of 30,000. The court unanimously held:

> We cannot say that the tax levied here is arbitrary, unreasonable or was actuated by anything other than good motive, however we rest our decision solely upon the proposition that any license tax based on volume of circulation and graduated by scale as it here presented is void as impairing the freedom of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution. (15 So.2d at 612-13).

In 1948, the Minnesota Attorney General advised the Minneapolis City Attorney that the city had no power to adopt a tax on every person, firm or corporation engaged in the business of publishing daily newspapers in the city at the rate of one cent per copy published. The Attorney General concluded that such a tax would be unconstitutional because, among other reasons, it applied only to newspaper publishers, and not to persons engaged in other lines of business; because it applied only to a limited group of publishers, and not to all newspapers, periodicals, and other publication; and because its effect would be to curtail circulation. Minn. Atty. Gen. Op. No. 90 (1948). Since there is no Minnesota decision in point, the opinion of the Attorney General carries considerable weight. *State v. Hartman*, 261 Minn. 314, 321, 112 N.W.2d 340, 345 (1962).

Even if taxes "appear" to be general, which the challenged use tax scheme is not, they may be invalidated if in practical effect they have a disproportionate impact on businesses protected by the First Amendment. In *City of Baltimore v. A. S. Abell Co.*, 145 A.2d 111 (Md. 1958), the Court of Appeals of Maryland, the highest court in that state, invalidated a 4% tax on the gross sales price of advertising, to be paid by the purchasers of advertising, and also invalidated a 2% tax on the gross receipts from the sale of advertising space and time. The tax applied to many forms of advertising, but 90 to 95% of the impact of the tax fell upon newspapers and radio and television stations. The court held:

> [W]hen the tax is imposed upon a business that enjoys one of the constitutional immunities of the First Amendment, it must be general in its nature and character and affect this business only incidentally as it affects other businesses in their combined duty to support the govern-

> ment . . . . The root of the evil in these ordinances lies not merely in the fact that they curtail the dollars received by the newpapers and the stations, but in the fact that being entitled to the advantages granted by the First Amendment, they are singled out and required to pay a special tax that is not required of business in general or some broad portion thereof. (145 A.2d at 118-19.)

The most obvious imperatives of *Grosjean* and its progeny are that: (i) government may not impose a tax which restricts circulation; (ii) government may not tax a select group of publishers, leaving others free of the burden of the tax; and (iii) government may not impose a tax directly upon, or in practical effect having its primary impact upon, publishers in general. Minnesota's use tax on the consumption of paper and ink products by publications ignores all of these imperatives.

The $100,000 exemption results in an effective tax rate which increases as circulation, and consumption of paper and ink products, increases. The $100,000 exemption results in a tax which, like the *Grosjean* tax, falls only upon a small group of the State's largest newspapers. Simply eliminating the $100,000 exemption will not save this tax, because of the third imperative of *Grosjean*. Minn. Stat. §297A.14 makes it clear that this use tax is specifically directed at publications; and, in any event, the tax falls with a disproportionate impact upon publications.

We should never forget what Justice Murphy of the United States Supreme Court stated in *Jones v. City of Opelika*, 319 U.S. 103:

> Liberty of circulation is the very life blood of a free press . . . , and taxes on the circulation of ideas have a long history of misuse against freedom of thought. . . .

> And taxes on circulation solely for the purpose of revenue were successfully resisted, prior to the adoption of the First Amendment, as interferences with freedom of the press.
>
> . . . If freedom of speech and freedom of the press are to have any concrete meaning, people seeking to distribute information and opinion, to the end only that others shall have the benefit thereof, should not be taxed for circulating such matter. . . . It is unnecessary to consider now the validity of such taxes on commercial enterprises engaged in the dissemination of ideas. . . .
>
> The exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes. (316 U.S. at 616-17, 619-20 (Murphy, J.))

CONCLUSION

Star Tribune pays many state and local taxes of general application without protesting their constitutionality. In 1974, it paid $355,000 in real estate taxes, $1,000,000 in state corporate income taxes, and $540,000 in payroll taxes (unemployment, worker's compensation and millage). In 1975, it paid $396,000 in real estate taxes, $1,085,333 in state corporate income taxes, and $561,000 in payroll taxes. Star Tribune is a responsible, "dues paying" corporate citizen of the State of Minnesota.

The challenged use tax is not, however, a tax of general application. It is a limited, special tax, in its effect in the nature of a license tax, which abridges the freedom of the press in four ways:

First, it taxes a select group of Minnesota publishers, leaving other Minnesota publishers free of its burden. This effect results from the $100,000 exemption.

Second, it is specifically and exclusively directed at publications in general; no other industrial users of paper and ink products are subject to this use tax.

Third, its direct tendency, if the tax is to be avoided, is to restrict circulation and thereby reduce the dissemination of information to the general public.

Fourth, it is the practical and legal equivalent of a direct tax on the exercise of a First Amendment right because of its special and limited impact.

Each of these unconstitutional abridgments of Star Tribune's right to freedom of the press mandates that this Court invalidate the challenged use tax.

For all the foregoing reasons this Court has determined that the challenged use tax on paper and ink products denies Star Tribune equal protection of the law and abridges the freedom of the press. Therefore, this Court, invalidates the challenged use tax and orders the return to Star Tribune of $874,265.04 in use taxes it paid.

Let this Memorandum become a part of the within and foregoing Order.

D.T.B.

APPENDIX D

Transcript of Judgment

STATE OF MINNESOTA
IN SUPREME COURT

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Respondent,

vs.

COMMISSIONER OF REVENUE,
Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

Dated and signed January 5, 1982.

By the Court.
Attest:
JOHN McCARTHY
Clerk

State of Minnesota
Supreme Court—ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, March 9, 1982.

JOHN McCARTHY
Clerk
By WAYNE TSCHIMPERLE
Deputy

APPENDIX E

Amended Notice of Appeal

No. 51616
STATE OF MINNESOTA
IN SUPREME COURT

Minneapolis Star and Tribune Company,
Plaintiff-Respondent,

vs.

Commissioner of Revenue,
Defendant-Appellant.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Minneapolis Star and Tribune Company, plaintiff-respondent herein, hereby appeals to the United States Supreme Court from the judgment entered on January 5, 1982, reversing the judgment entered by the

Hennepin County District Court in favor of plaintiff-respondent. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: March 10, 1982.

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AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota
County of Hennepin—ss.

PAMELA GEHLEN of the City of St. Louis Park, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 10th day of March, 1982, she served the annexed Amended Notice of Appeal on the following attorneys by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minne-

apolis, Minnesota, directed to said attorneys at the following addresses:

Mr. Paul R. Kempainen
Special Assistant
State of Minnesota
Office of the Attorney General
St. Paul, Minnesota 55155
Mr. Peter Schroth
Professor of Law
1536 Hewitt Avenue
St. Paul, Minnesota 55104

PAMELA GEHLEN

Subscribed and sworn to before me this 10th day of March, 1982. — Marcia Gruenhagen, Notary Public, Dakota County, Minnesota. My commission expires Aug. 26, 1986.

APPENDIX F

Statutes Involved
Changes or additions are indicated by italics,
deletions by capitals in parentheses.
Provisions directly affecting the publications
exemption are reproduced in boldface.

(1) 1971 Laws of Minnesota—Extra Session,
Chapter 31, Article I.

EXTRA SESSION
CHAPTER 31—H.F.No.262
[Coded in Part]

An act relating to the organization, operation, and financing of state and local government; appropriating money therefor; amending Minnesota Statutes 1969, Chapters 6, 124, 275 and 298, by adding sections; and Sections 122.45, by adding a sub-

division; 124.03, by adding a subdivision; 124.04; 124.09; 124.10, Subdivision 3; 124.11; 124.13; 124.17, as amended; 124.215, by adding a subdivision; 124.22, Subdivision 3, as amended; 124.28, Subdivision 3; 168.013, Subdivision 1, as amended; 270.075, Subdivision 1; 272.02, as amended; 272.03, Subdivision 1; 273.12, as amended; 273.13, Subdivisions 4, 7, 9, 13, 14, and 17, as amended, and by adding subdivisions; 273.134; 273.135, as amended; 273.41; 290.06, Subdivisions 1 and 2b, as amended, and 3b, and by adding a subdivision; 290.0601, Subdivisions 6, 8, and 9; 290.0607; 290.0608; 290.09, Subdivision 4, and by adding a subdivision; 290.18, Subdivision 2; 290.361, Subdivisions 2 and 4, as amended; 290.62; 290.92, by adding a subdivision; 290.983, Subdivision 1; 291.09, Subdivision 3; 291.11, Subdivision 1; 291.15; 291.18; 291.35; 294.28; 297.02, Subdivision 1, as amended; 297.03, Subdivision 5; 297.13, Subdivision 1; 297.22, Subdivision 1; 297A.01, Subdivision 3; 297A.02; 297A.03, Subdivision 2; 297A.14, as amended; 297A.25, Subdivision 1, as amended; 297A.51; 297A.57; 298.01, Subdivisions 1 and 2; 298.02, Subdivision 1; 298.25; 298.27; 298.28; 299.01; 298.32; 298.39; 298.396; 299.012, Subdivision 1; 340.47, Subdivisions 1 and 2; 340.60, Subdivision 2; 352.041, Subdivision 5; 353.28, Subdivision 8; 355.299; 393.01, Subdivision 4; 471.61, Subdivision 1, as amended, and 2a; 474.01, Subdivision 5; 474.02, Subdivisions 1 and 2; 474.04; 474.05; and 474.06; Laws 1969, Chapter 857, Section 2; Laws 1971, Chapters 736, Section 1; 853, Sections 2 and 3, and 918, by adding a section; repealing Minnesota Statutes 1969, Chapters 286 and 289; Sections 122.45, Subdivision 3; 124.211; 124.215, Subdivisions 1, as amended, and 2; 124.51; 273.13, Subdivision 5, as amended and 15; 273.69; 275.12; 275.123; 290.06, Subdivision 2; 290.0613; 297.221; 297A.51 to 297A.60; 298.011, as amended; 298.025; 298.41; 298.42;

298.43; 298.44; 298.45; 299.011, as amended; 290.06, Subdivisions 4 and 6, as amended; 290.0613; 290.361, Subdivisions 6 and 7, as amended; 340.47, Subdivisions 3, 4, 5, as amended, and 6; and Laws 1959, Chapter 462, Section 6, as amended; Laws 1961, Chapter 444; Laws 1965, Chapters 240; and 705, Section 1, Subdivisions 12, 13, 14, 15, 16, and 17, as amended; and Laws 1969, Chapter 699, Section 2.

Be it enacted by the Legislature of the State of Minnesota:

ARTICLE I

Section 1. Minnesota Statutes 1969, Section 297A.01, Subdivision 3, is amended to read:

Subd. 3. A "sale" and a "purchase" includes, but is not limited to, each of the following transactions:

(a) Any transfer of title or possession, or both, of tangible personal property, whether absolutely or conditionally, and the leasing of or the granting of a license to use or consume tangible personal property, for a consideration in money or by exchange or barter;

(b) The production, fabrication, printing or processing of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production, fabrication, printing or processing;

(c) The furnishing, preparing or serving for a consideration of food, meals or drinks, not including hospitals, sanatoriums, nursing homes or senior citizens homes, meals and lunches served at public and private schools, universities or colleges, or the occasional meal thereof by a charitable or church organization;

(d) The granting of the privilege of admission to places of amusement or athletic events and the privilege of use of amusement devices;

(e) The furnishing for a consideration of lodging and related services by a hotel, rooming house, tourist court, motel or

trailer camp and of the granting of any similar license to use real property other than the renting or leasing thereof for a continuous period of 30 days or more;

(f) The furnishing for a consideration of electricity, gas, water, or steam for use or consumption within this state, or local exchange telephone service *and intrastate toll service* except such service provided by means of coin operated telephones. (INCLUDING) Sales by municipal corporations in a proprietary capacity *are included in the provisions of this clause.*

Sec. 2. Minnesota Statutes 1969, Section 297A.02, is amended to read:

297A.02 IMPOSITION OF TAX. *Except as otherwise provided in this article,* there is hereby imposed an excise tax of (THREE) *four* percent of the gross receipts (OF ANY PERSON) from sales at retail, as hereinbefore defined, made *by any person* in this state after (JULY 31, 1967) *October 31, 1971.* (IN NO CASE SHALL THE TAX IMPOSED HEREBY UPON THE SELLER EXCEED THE AMOUNT OF TAX WHICH HE IS AUTHORIZED AND REQUIRED BY LAW TO COLLECT FROM THE PURCHASER.)

Notwithstanding the foregoing, the tax imposed hereby upon sales at retail through coin-operated vending machines shall be three percent of the gross receipts of such sales.

Sec. 3. Minnesota Statutes 1969, Section 297A.03, Subdivision 2, is amended to read:

Subd. 2. It shall be unlawful for any retailer to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer, or that it will not be added to the sales price or that, if added, it or any part thereof will be re-

funded except that in computing the tax to be collected as the result of any transaction amounts of tax less than one half of one cent may be disregarded and amounts of tax if one half cent or more may be considered an additional cent. If the sales price of any sale at retail is (16) *12* cents or less, no tax shall be collected. Any person violating this provision shall be guilty of a misdemeanor.

Sec. 4. Minnesota Statutes 1969, Section 297A.14, as amended by Laws 1971, Chapter 430, Section 1, is amended to read:

297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES. For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricty, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of (THREE) *four* percent of the sales price of sales at retail of any of the aforementioned items made to such person after (JULY 31, 1967) *October 31, 1971*, unless the tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Sec. 5. Minnesota Statutes 1969, Section 297A.25, Subdivision 1, as amended by Laws 1971, Chapter 123, Section 1; Laws 1971, Chapter 124, Section 1; and Laws 1971, Chapter 740, Section 2, is amended to read:

297A.25 EXEMPTIONS. Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:

(a) The gross receipts from the sale of food products including but not limited to cereal and cereal products, butter, cheese, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products;

(b) The gross receipts from the sale of prescribed drugs and medicine intended for use, internal or external, in the cure, mitigation, treatment or prevention of illness or disease in human beings and products consumed by humans for the preservation of health, including prescription glasses, therapeutic and prosthetic devices, but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein;

(c) The gross receipts from the sale of and the storage, use or other consumption in Minnesota of tangible personal property, tickets, or admissions, electricity, gas, or local exchange telephone service, which under the Constitution or laws of the United States or under the Constitution of Minnesota, the state of Minnesota is prohibited from taxing;

(d) The gross receipts from the sale of tangible personal property, the ultimate destination of which is outside the state of Minnesota and which is not thereafter returned to a point within Minnesota except in the course of interstate commerce;

(f) The gross receipts from the sale of and storage, use or consumption of petroleum products upon which a tax has been imposed under the provisions of Minnesota Statutes 1965, Chapter 296, whether or not any part of said tax may be subsequently refunded;

(g) The gross receipts from the sale of clothing and wearing apparel except the following:

(i) all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semi-precious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with precious metals or imitations thereof; watches; clocks; cases and movements for watches and clocks; gold, gold-plated, silver, or sterling flatware or hollow ware and silver-plated hollow ware; opera glasses; lorgnettes; marine glasses; field glasses and binoculars.

(ii) articles made of fur on the hide or pelt, and articles of which such fur is the component material or chief value, but only if such value is more than three times the value of the next most valuable component material.

(iii) perfume, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous and toilet powders. The tax imposed by this act shall not apply to lotion, oil, powder, or other article intended to be used or applied only in the case of babies.

(iv) trunks, valises, traveling bags, suitcases, satchels, overnight bags, hat boxes for use by travelers, beach bags, bathing suit bags, brief cases made of leather or imitation leather, salesmen's sample and display cases, purses, handbags, pocketbooks, wallets, billfolds, card, pass, and key cases and toilet cases.

(h) The gross receipts from the sale of and the storage, use, or consumption of all materials, including chemicals, fuels, petroleum products, lubricants, packaging materials, feeds, seeds, fertilizers, electricity, gas and steam, used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail, whether or not the item so used becomes an ingredient or constituent part

of the property produced. Such production shall include, but is not limited to, production of any tangible personal property, manufacturing, processing (other than by restaurants and consumers) of agricultural products whether vegetable or animal, commercial fishing, refining, smelting, reducing, brewing, distilling, printing, mining, quarrying, lumbering, generating electricity and road building. Such production shall not include painting, cleaning, repairing or similar processing of property except as part of the original manufacturing process. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures used in such production and fuel, electricity, gas or steam used for space heating or lighting, are not included within this exemption;

(i) The gross receipts from the sale of and storage, use or other consumption in Minnesota of tangible personal property (*except paper or ink products*) which is used or consumed (IN OR BECOMES AN INGREDIENT OR COMPONENT PART OF) *producing* any publication regularly issued at average intervals not exceeding three months (, AND ANY SUCH PUBLICATION). For purposes of this subsection, "publication" as used herein shall include, without limiting the foregoing, a legal newspaper as defined by Minnesota Statutes 1965, Section 331.02, and any supplements or enclosures with or part of said newspaper; and the gross receipts of any advertising contained therein or therewith shall be exempt. For this purpose, advertising in any such publication shall be deemed to be a service and not tangible personal property, and persons or their agents who publish or sell such newspapers shall be deemed to be engaging in a service with respect to gross receipts realized from such newsgathering or publishing activities by them, including the sale of advertising. Machinery, equipment, implements, tools, accessories, appliances, con-

trivances, furniture and fixtures used in such publication and fuel, electricity, gas or steam used for space heating or lighting, are not (INCLUDED WITHIN THIS EXEMPTION) ***exempt*****;**

(j) The gross receipts from all sales of tangible personal property to, and all storage, use or consumption of such property by, the United States and its agencies and instrumentalities or **(THE)** *a* state **(OF MINNESOTA)** and its agencies, instrumentalities and political subdivisions;

(k) The gross receipts from the isolated or occasional sale of tangible personal property in Minnesota not made in the normal course of business of selling that kind of property, and the storage, use, or consumption of property acquired as a result of such a sale;

((L) THE GROSS RECEIPTS FROM SALES OF TANGIBLE PERSONAL PROPERTY TO, AND THE STORAGE, USE OR OTHER CONSUMPTION OF SUCH PROPERTY BY PERSONS TAXED ON THE GROSS EARNINGS BASIS IN LIEU OF AD VALOREM TAXES UNDER THE PROVISIONS OF MINNESOTA STATUTES 1965, CHAPTERS 294 AND 295, AND BY PERSONS TAXED FOR AD VALOREM TAX PURPOSES UNDER THE IN LIEU PROVISIONS OF MINNESOTA STATUTES 1965, CHAPTER 298; PROVIDED, HOWEVER, THAT THE EXCLUSION GRANTED TO PERSONS TAXED UNDER THE PROVISIONS OF CHAPTER 298, SHALL NOT APPLY TO MACHINERY, EQUIPMENT, IMPLEMENTS, TOOLS, ACCESSORIES, APPLIANCES, CONTRIVANCES, FURNITURE, SUPPLIES, FIXTURES AND OTHER TANGIBLE ITEMS PURCHASED FOR THE PURPOSES OF ADMINISTRATION, INCLUDING, BUT NOT LIMITED TO, MANAGEMENT, ACCOUNTING, ADVERTISING, INDUSTRIAL AND PUBLIC RELATIONS FUNCTIONS;)

(l) The gross receipts from sales of rolling stock and the storage, use or other consumption of such property by railroads, freight line companies, sleeping car companies and express companies taxed on the gross earnings basis in lieu of ad valorem taxes. For purposes of this clause "rolling stock" is defined as the portable or moving apparatus and machinery of any such company which moves on the road, and includes, but is not limited to, engines, cars, tenders, coaches, sleeping cars and parts necessary for the repair and maintenance of such rolling stock.

((M) THE GROSS RECEIPTS FROM SALES OF TANGIBLE PERSONAL PROPERTY TO, AND THE STORAGE, USE, OR OTHER CONSUMPTION OF SUCH PROPERTY BY PERSONS TAXED UNDER THE PROVISIONS OF MINNESOTA STATUTES 1965, Sections 270.071 TO 270.079, INCLUSIVE;)

(m) The gross receipts from sales of airflight equipment and the storage, use or other consumption of such property by airline companies taxed under the provisions of Minnesota Statutes 1969, Sections 270.071 to 270.079, inclusive. For purposes of this clause, "airflight equipment" includes airplanes and parts necessary for the repair and maintenance of such airflight equipment, and flight simulators.

(n) The gross receipts from the sale of telephone central office telephone equipment used in furnishing intrastate and interstate telephone service to the public.

(o) The gross receipts from the sale of and the storage, use or other consumption by persons taxed under the in lieu provisions of Minnesota Statutes 1969, Chapter 298, of mill liners, grinding rods and grinding balls which are substantially consumed in the production of taconite, the material of which primarily is added to and becomes a part of the material being processed.

((N)) *(p)* The gross receipts from the sale of tangible personal property to, and the storage, use or other consumption of such property by, any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes;

((O)) *(q)* The gross receipts from the sale of caskets and burial vaults;

((P)) *(r)* The gross receipts from the sale of cigarettes.

((Q)) *(s)* The gross receipts from the sale of an automobile or other conveyance if the purchaser is assisted by a grant from the United States in accordance with 38 United States code, Section 1901, as amended.

((Q)) *(t)* The gross receipts from the sale to the licensed aircraft dealer of an aircraft for which a commercial use permit has been issued pursuant to section 1 *of Laws 1971, Chapter 740,* if the aircraft is resold while the permit is in effect.

((R)) *(u)* The gross receipts from the sale of building materials to be used in the construction or remodeling of a residence when the construction or remodeling is financed in whole or in part by the United States in accordance with 38 United States Code, Sections 801 to 805, as amended. This exemption shall not be effective at time of sale of the materials to contractors, subcontractors, builders or owners, but shall be applicable only upon a claim for refund to the commissioner of taxation filed by recipients of the benefits provided in Title 38 United States Code, Chapter 21, as amended. The Commissioner shall provide by regulation for the refund of taxes paid on sales exempt in accordance with this paragraph.

Sec. 6. *The increase in tax levied by this article shall not apply to the gross receipts from sales at retail made pursuant to bona fide written contracts, nor to lump sum or fixed price construction contracts which unconditionally vest the rights*

and obligations of the parties thereto and which do not make provision for allocation of future taxes; provided that such contracts were enforceable prior to November 1, 1971; and further provided that (1) in the case of construction contracts the delivery of tangible personal property used in performing such construction contract is made on or prior to November 1, 1972, and (2) in the case of all other contracts subject to this section the delivery of tangible personal property subject thereto is made on or prior to December 15, 1971.

Sec. 7. Minnesota Statutes 1969, Section 297A.51, is amended to read:

297A.51 DISTRIBUTION OF TAX PROCEEDS. One-fourth of the sum of the revenues transferred to the general fund pursuant to section 297.13, subdivision 1, plus the amount which the tax imposed by sections 297A.01 to 297A.44 raises annually shall be distributed to townships, cities, villages, boroughs, counties and school districts as provided in sections 297A.51 to 297A.60. *This section shall not apply to any distributions made after the calendar year 1971.*

Sec. 8. *Except as otherwise provided herein, sections 1 to 7 are effective as to all sales made after October 31, 1971.*

Sec. 9. Laws 1971, Chapter 853, Section 2, is amended to read:

Sec. 2. [297B.02] TAX IMPOSED. There is hereby imposed an excise tax at the rate (OF THREE PERCENT) *provided in Minnesota Statutes, Chapter 297A* on the purchase price of any motor vehicle purchased or acquired, either in or outside of the state of Minnesota, which is required to be registered under the laws of this state.

Sec. 10. Laws 1971, Chapter 853, Section 3, is amended to read:

Sec. 3. [297B.03] EXEMPTIONS. There is specifically exempted from the provisions of this chapter and from computation of the amount of tax imposed by it the following:

(1) Purchase or use of any motor vehicle by any person described in and subject to the conditions provided in Minnesota Statutes, Section 297A.25, Subdivision 1, Clauses (j), ((L), (M), (N) AND (Q)) *(p) and (s).*

(2) Purchase or use of any motor vehicle by any person who was a resident of another state at the time of the purchase and who subsequently becomes a resident of Minnesota, provided the purchase occurred more than 60 days prior to the date such person moved his residence to the state of Minnesota.

(3) Purchase or use of any motor vehicle by any person making a valid election to be taxed under the provisions of Laws 1971, Chapter 115.

Sec. 11. *The provisions of sections 9 and 10 shall be effective January 1, 1972.*

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Approved October 30, 1971.

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(2) 1973 Laws of Minnesota,
Chapter 650, Article XIII.

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CHAPTER 650 — H. F. NO. 2121
[Coded in Part]

An act relating to government; raising revenue; providing for the administration of public welfare and other public activities; appropriating money; providing penalties; amending Minnesota Statutes 1971, Chapters 272; 273; 275; and 290; by adding sections; Sections 93.52, Subdivision 2; 93.55; 93.58;

124.03, Subdivision 3; 245.77; 261.04, Subdivision 1; 261.063; 272.02, Subdivision 1; 272.03, Subdivision 1; 272.04, Subdivision 1; 273.11; 273.13, Subdivisions 4, 6, and 7, and by adding a subdivision; 273.134; 273.41; 275.09, Subdivision 3; 275.50, Subdivisions 2, 4, and 5; 275.51, Subdivisions 1, 2, 3, 4, and by adding a subdivision; 275.52, Subdivisions 2 and 3; 275.53, Subdivisions 1 and 3; 275.55; 287.12; 290.06, Subdivision 1; 290.0601, Subdivisions 6 and 9; 290.0604; 290.061; 290.081; 290.17; 290.19, Subdivision 1, and by adding a subdivision; 290.361, Subdivisions 2 and 4; 290.982; 290.983, Subdivision 1; 290.99; 291.33, Subdivision 2; 293.07, Subdivision 2; 297.13, Subdivision 1; 297A.14; 297A.25, Subdivision 1; 340.60, Subdivision 1; 376.424; 393.01, Subdivision 3; 393.07, Subdivision 2, 393.08, Subdivision 1; 414.01, by adding a subdivision; and 477A.01, Subdivisions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, and 17; repealing Minnesota Statutes 1971, Sections 93.53; 93.54; 93.56; 93.57; 245.46; 261.01; 261.02; 261.03; 261.05; 261.06; 261.061; 261.064; 261.065; 261.066; 261.067; 261.07; 261.08; 261.10; 261.11; 261.123; 261.124; 261.125; 261.126; 261.14; 261.141; 261.142; 261.143; 261.26; 276.15; 276.16; 276.17; 276.18; 290.0607; 290.0617; 295.38; 297.13, Subdivisions 2, 3, 4, 5, 6, 7, and 8; 297.15; 297.16; 297A.252; 340.60, Subdivisions 2, 3, 4, 5, 6, and 7; 368.39; 368.40; 368.41; 368.42; 373.20; 373.21; 373.22; 373.23; 373.24; 393.08, Subdivision 2; and 477A.01, Subdivisions 12 and 15.

Be it enacted by the Legislature of the State of Minnesota:

* * * * *

ARTICLE XIII

Section 1. Minnesota Statutes 1971, Section 297A.14, is amended to read:

297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES.

For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section.

Sec. 2. Minnesota Statutes 1971, Section 297A.25, Subdivision 1, is amended to read:

297A.25 EXEMPTIONS. Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:

(a) The gross receipts from the sale of food products including but not limited to cereal and cereal products, butter, cheese, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products;

(b) The gross receipts from the sale of prescribed drugs and medicine intended for use, internal or external, in the

cure, mitigation, treatment or prevention of illness or disease in human beings and products consumed by humans for the preservation of health, including prescription glasses, therapeutic and prosthetic devices, but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein;

(c) The gross receipts from the sale of and the storage, use or other consumption in Minnesota of tangible personal property, tickets, or admissions, electricity, gas, or local exchange telephone service, which under the Constitution or laws of the United States or under the Constitution of Minnesota, the state of Minnesota is prohibited from taxing;

(d) The gross receipts from the sale of tangible personal property, the ultimate destination of which is outside the state of Minnesota and which is not thereafter returned to a point within Minnesota except in the course of interstate commerce;

(f) The gross receipts from the sale of and storage, use or consumption of petroleum products upon which a tax has been imposed under the provisions of chapter 296, whether or not any part of said tax may be subsequently refunded;

(g) The gross receipts from the sale of clothing and wearing apparel except the following:

(i) all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with precious metals or imitations thereof; watches; clocks; cases and movements for watches and clocks; gold, gold-plated, silver, or sterling flatware or hollow ware and silver-plated hollow ware; opera glasses; lorgnettes; marine glasses; field glasses and binoculars.

(ii) articles made of fur on the hide or pelt, and articles of which such fur is the component material or chief value, but only if such value is more than three times the value of the next most valuable component material.

(iii) perfume, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous and toilet powders. The tax imposed by this act shall not apply to lotion, oil, powder, or other article intended to be used or applied only in the case of babies.

(iv) trunks, valises, traveling bags, suitcases, satchels, overnight bags, hat boxes for use by travelers, beach bags, bathing suit bags, brief cases made of leather or imitation leather, salesmen's sample and display cases, purses, handbags, pocketbooks, wallets, billfolds, card, pass, and key cases and toilet cases.

(h) The gross receipts from the sale of and the storage, use, or consumption of all materials, including chemicals, fuels, petroleum products, lubricants, packaging materials, *including returnable containers used in packaging food and beverage products*, feeds, seeds, fertilizers, electricity, gas and steam, used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail, whether or not the item so used becomes an ingredient or constituent part of the property produced. Such production shall include, but is not limited to, *research, development, design or* production of any tangible personal property, manufacturing, processing (other than by restaurants and consumers) of agricultural products whether vegetable or animal, commercial fishing, refining, smelting, reducing, brewing, distilling, printing, mining, quarrying, lumbering, generating electricity and road building. Such production shall not include

painting, cleaning, repairing or similar processing of property except as part of the original manufacturing process. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures, used in such production and fuel, electricity, gas or steam used for space heating or lighting, are not included within this exemption; *however, accessory tools, equipment and other short lived items, which are separate detachable units used in producing a direct effect upon the product, where such items have an ordinary useful life of less than 12 months, are included within the exemption provided herein;*

(i) The gross receipts from the sale of and storage, use or other consumption in Minnesota of tangible personal property (except (PAPER OR INK PRODUCTS) *as provided in section 297A.14*) which is used or consumed in producing any publication regularly issued at average intervals not exceeding three months, *and any such publication.* For purposes of this subsection, "publication" as used herein shall include, without limiting the foregoing, a legal newspaper as defined by Minnesota Statutes 1965, Section 331.02, and any supplements or enclosures with or part of said newspaper; and the gross receipts of any advertising contained therein or therewith shall be exempt. For this purpose, advertising in any such publication shall be deemed to be a service and not tangible personal property, and persons or their agents who publish or sell such newspapers shall be deemed to be engaging in a service with respect to gross receipts realized from such newsgathering or publishing activities by them, including the sale of advertising. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures used in such publication and fuel, electricity, gas or steam used for space heating or lighting, are not exempt;

(j) The gross receipts from all sales of tangible personal property to, and all storage, use or consumption of such property by, the United States and its agencies and instrumentalities or a state and its agencies, instrumentalities and political subdivisions;

(k) The gross receipts from the isolated or occasional sale of tangible personal property in Minnesota not made in the normal course of business of selling that kind of property, and the storage, use, or consumption of property acquired as a result of such a sale;

(l) The gross receipts from sales of rolling stock and the storage, use or other consumption of such property by railroads, freight line companies, sleeping car companies and express companies taxed on the gross earnings basis in lieu of ad valorem taxes. For purposes of this clause "rolling stock" is defined as the portable or moving apparatus and machinery of any such company which moves on the road, and includes, but is not limited to, engines, cars, tenders, coaches, sleeping cars and parts necessary for the repair and maintenance of such rolling stock.

(m) The gross receipts from sales of airflight equipment and the storage, use or other consumption of such property by airline companies taxed under the provisions of sections 270.-071 to 270.079. For purposes of this clause, "airflight equipment" includes airplanes and parts necessary for the repair and maintenance of such airflight equipment, and flight simulators.

(n) The gross receipts from the sale of telephone central office telephone equipment used in furnishing intrastate and interstate telephone service to the public.

(o) The gross receipts from the sale of and the storage, use or other consumption by persons taxed under the in lieu provi-

sions of chapter 298, of mill liners, grinding rods and grinding balls which are substantially consumed in the production of taconite, the material of which primarily is added to and becomes a part of the material being processed.

(p) The gross receipts from the sale of tangible personal property to, and the storage, use or other consumption of such property by, any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes;

(q) The gross receipts from the sale of caskets and burial vaults;

(r) The gross receipts from the sale of cigarettes.

(s) The gross receipts from the sale of an automobile or other conveyance if the purchaser is assisted by a grant from the United States in accordance with 38 United States Code, Section 1901, as amended.

(t) The gross receipts from the sale to the licensed aircraft dealer of an aircraft for which a commercial use permit has been issued pursuant to section 360.654, if the aircraft is resold while the permit is in effect.

(u) The gross receipts from the sale of building materials to be used in the construction or remodeling of a residence when the construction or remodeling is financed in whole or in part by the United States in accordance with 38 United States Code, Sections 801 to 805, as amended. This exemption shall not be effective at time of sale of the materials to contractors, subcontractors, builders or owners, but shall be applicable only upon a claim for refund to the commissioner of taxation filed by recipients of the benefits provided in Title 38 United States Code, Chapter 21, as amended. The commissioner shall provide by regulation for the refund of taxes paid on sales exempt in accordance with this paragraph.

(v) The gross receipts from the sale of textbooks which are prescribed for use in conjunction with a course of study in a public or private school, college, university and business or trade school to students who are regularly enrolled at such institutions. For purposes of this clause a "public school" is defined as one that furnishes course of study, enrollment and staff that meets standards of the state board of education and a private school is one which under the standards of the state board of education, provides an education substantially equivalent to that furnished at a public school. Business and trade schools shall mean such schools licensed pursuant to Minnesota Statutes, Section 141.25.

(w) The gross receipts from the sale of and the storage of material designed to advertise and promote the sale of merchandise or services, which material is purchased and stored for the purpose of subsequently shipping or otherwise transferring outside the state by the purchaser for use thereafter solely outside the state of Minnesota.

Sec. 3. *Minnesota Statutes 1971, Section 297A.252, is repealed.*

Sec. 4. *The provisions of this article shall be effective after December 31, 1973.*

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APPENDIX G

Calculation of Effective Rate of Use Tax on Paper and Ink Products (originally submitted as Appendix E to Star Tribune's Memorandum in Support of Motion for Summary Judgment).

Introduction

The effective rate of use tax is calculated by multiplying the actual tax paid [at a rate of 4 per cent] by 25 to determine the

cost of paper and ink products subject to tax, then adding the $100,000 exemption to determine the total cost of paper and ink products consumed by each publication, and then dividing the actual tax paid by the total cost of paper and ink products consumed, as follows:

$$\frac{\text{tax paid}}{25\ (\text{tax paid}) + \$100{,}000} = \text{effective rate of tax}$$

The figures for the Minneapolis, St. Paul and Duluth newspapers assume that the publishers took two exemptions of $100,000 (one for the morning and Sunday publication and one for the evening publication).

1974 TAX TABLE

Newspaper	Effective Rate of Use Tax on Paper and Ink Products
Minneapolis Star (Evening)	3.948%
Tribune (Morning)	
Tribune (Sunday)	
St. Paul Dispatch (Evening)	3.848%
Pioneer Press (Morning)	
Pioneer Press (Sunday)	
Duluth Herald (Evening)	3.234%
News-Tribune (Morning)	
News-Tribune (Sunday)	
Rochester Post-Bulletin	3.355%
St. Cloud Times	3.13%
Mankato Free Press	2.641%
Winona Daily News	1.728%
Worthington Daily Globe	.207%
Willmar West Central Daily Tribune	1.061%
Virginia Mesabi Daily News	.722%
Fergus Falls Daily Journal	.117%

1975 TAX TABLE

Newspaper	Effective Rate of Use Tax on Paper and Ink Products
Minneapolis Star (Evening)	3.950%
Tribune (Morning)	
Tribune (Sunday)	
St. Paul Dispatch (Evening)	3.858%
Pioneer Press (Morning)	
Pioneer Press (Sunday)	
Duluth Herald (Evening)	3.326%
News-Tribune (Morning)	
News-Tribune (Sunday)	
Rochester Post-Bulletin	3.313%
St. Cloud Times	3.037%
Mankato Free Press	2.802%
Winona Free Press	1.189%
Willmar West Central Daily Tribune	1.428%
Worthington Daily Globe	.752%
Virginia Mesabi Daily News	1.43 %
Fergus Falls Daily Journal	.198%
Brainerd Daily Dispatch	.564%
Austin Daily Herald	1.166%